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IN THE

Supreme Court of the United States

October Term, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

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No.

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NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Petitioners, Pennsylvania State Representatives Nicholas Colafella, K. Leroy Irvis, James J. Manderino, Matthew J. Ryan, and the Bipartisan Committee for the Administration of the House of Representatives, respectfully pray that a writ of certiorari issue to review the Judgment and Opinion of the United States Court of Appeals for the Third Circuit entered on June 9, 1987.

OPINIONS BELOW

The June 9, 1987 Opinion of the United States Court of Appeals for the Third Circuit is reported at 821 F.2d 946 and is reprinted in Appendix A hereto at 1a.

The January 31, 1986 Memorandum Opinion and Order of the United States District Court for the Middle District of Pennsylvania granting in most respects Petitioners' motion to quash are reported at 626 F.Supp. 1319 and are reprinted in Appendices B and C hereto, respectively, at 24a and 41a.

JURISDICTION

The Judgment of the Court of Appeals was entered on June 9, 1987. The Court of Appeals denied a timely petition for rehearing on July 6, 1987. On August 24, 1987, Justice Brennan signed an Order requiring this petition to be filed on or before October 4, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

This litigation stems from service of a federal grand jury subpoena *duces tecum* on Pennsylvania State Representative Nicholas Colafella. At the time the subpoena was served, Representative Colafella was Chairman of an ongoing investigative committee, the Select Committee to Investigate Compliance with the Steel Products Procurement Act (the "Select Committee" or "Committee"). The Select Committee, which was three years into an investigation of the Pennsylvania State Capitol Building expansion project, was comprised of members of the House of Representatives of the General Assembly of the Commonwealth of Pennsylvania.

The investigation consisted of fact-finding by Committee members, staff and investigators. Witnesses were interviewed and called to appear before the Select Committee.

After the Committee received the sworn public testimony of Pennsylvania Secretary of General Services Walter Baran, whose actions were being scrutinized for propriety and legality, Secretary Baran requested the United States Attorney for the

Middle District of Pennsylvania to investigate the same alleged improprieties that were the subject of the Committee's investigation. Appendix B at 25a. Shortly thereafter, the United States Attorney commenced this grand jury investigation.

Prior to service of the subpoena, Committee Chairman Colafella and Committee Counsel Reizdan Moore met with the United States Attorney and agents from the Federal Bureau of Investigation and gave them names of witnesses, information and leads to investigate, but would not give them information that was to be made public at hearings in the next two weeks. Shortly after these discussions, on January 15, 1986, the United States Attorney caused the subpoena to issue, even though the Committee voluntarily provided substantial information to the F.B.I. prior to issuance of the subpoena, the information sought was readily available from sources other than the Committee; and the sources were accessible to the F.B.I., but apparently not exploited. Appendix B at 39a.

The United States Attorney stipulated before the District Court, and the District Court found, that no member of the state legislature was a subject or target of the federal investigation. Appendix B at 32a.

The subpoena, which was served and compelled compliance during the ongoing legislative investigation, demanded the totality of the Committee's investigative records. The subpoena commanded production of:

> All records in your care, custody and control relating to an investigation of the purchase of granite use [sic] in the Capitol addition project as follows:
>
> 1. Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individuals and companies named on the attached list.

> 2. Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts summaries, agenda or minutes during testimony or in comments by committee members or staff.

The subpoena sought all records and documents relating to twenty-three companies and individuals, including Committee Counsel.

On January 17, 1986, a motion to quash the subpoena was filed on behalf of: Nicholas Colafella, Chairman of the Select Committee; K. Leroy Irvis, Speaker of the House; James J. Manderino, Majority Leader of the House; Matthew J. Ryan, Minority Leader of the House; and the Bipartisan Committee for the Administration of the House of Representatives, all Petitioners herein. 28 U.S.C. §1331 conferred jurisdiction on the District Court.

Petitioners argued to the District Court that the Select Committee enjoys an immunity protecting it from forced disclosure of documents and information based on the policies underlying the Speech or Debate Clause of the United States Constitution. Petitioners urged that the same policies supporting the federal legislators' speech or debate immunity, to-wit, the need for legislators to be free from threats, harassment, distraction, disruption and burdensome inquiry, also support application of the immunity to state legislators.

On January 31, 1986, the District Court granted much of the requested relief and ordered that the subpoena be quashed in most respects. *See* Appendices B and C. The court held that Petitioners were entitled to invoke the federal common law immunity from the effects of the grand jury subpoena, the immunity being based on the principles of federalism and the policy considerations which support the Speech or Debate Clause of the United States Constitution. The District Court ordered as follows:

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT the Motion to Quash Subpoena is granted, EXCEPT with respect to the following materials:

1. The identities of all witnesses;

2. Any exhibits or documents of which the grand jury may become aware, in the course of its investigation, authored by witnesses or by third parties other than the Committee or its members, which are in the possession of the Committee and which cannot be obtained from any other source.

With respect to this information, the subpoena, as modified, shall be enforced.

Appendix C.

The United States appealed the District Court's order to the United States Court of Appeals for the Third Circuit. On June 9, 1987, a panel of the Third Circuit reversed the District Court's decision and remanded for proceedings consistent with its opinion. *See* Appendix A.

In so ruling, the Court of Appeals refused to recognize either an absolute legislative immunity sought by the legislators or a qualified privilege recognized by the District Court as protecting the investigative committee, relying in large part on *United States v. Gillock*, 445 U.S. 360 (1980). The Court of Appeals concluded that the interests in preventing intrusion into the legislative process and protecting legislative independence did not justify protection.

On July 6, 1987, the Court of Appeals denied Petitioners' timely petition for rehearing. On July 14, 1987, the Court of Appeals stayed issuance of the mandate in this case until October 5, 1987, upon Petitioners' representation of an intention to file a petition for a writ of certiorari with this Court. On August 24, 1987, Justice Brennan ordered that the petition be filed on or before October 4, 1987.

REASONS FOR GRANTING THE WRIT

This Court should review this case for three reasons. First, the case presents an important question of federal law which has not been, but should be, settled by this Court, specifically: Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation? Second, the decision of the Court of Appeals in refusing to recognize the immunity is inconsistent and conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits. Finally, the decision of the Court of Appeals misconceives the meaning and misapprehends the scope of *United States v. Gillock*, 445 U.S. 360 (1980), the implications of which are in need of clarification by this Court. For these reasons, review by this Court of this fundamental question of the existence of and necessity for legislative immunity and its special value in our system of government is warranted.

A. This case presents an important question of federal law which has not been, but should be, settled by this Court.

The issue involved in this case is neither academic nor episodic; nor is it peculiar to Petitioners. As this petition and the anticipated *amicus curiae* briefs point out, this case presents a fundamental and recurring question concerning legislative immunity of importance to legislatures across the nation.[1] The Court of Appeals refused to recognize the long-established doctrine of legislative immunity as protecting an ongoing investigative committee of a state legislature from forced disclosure of documents to a federal grand jury. The Court of Appeals' decision casts grave doubt on the continued free exercise of state

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1. Petitioners anticipate the filing of *amicus curiae* briefs supporting this petition by the National Conference of State Legislatures as well as a number of state legislatures individually. The *amicus* briefs will establish the recurring nature of federal interference with legislatures in states other than Pennsylvania and the importance of the immunity to each *amicus*.

legislative functions and the independence of state legislatures nationally. It is an affront to the integrity of the state legislative process.

Legislative immunity occupies an integral and hallowed place in our republican form of government as the guarantor of legislative independence. In *Tenney v. Brandhove*, 341 U.S. 367, 372 (1951), this Court stated that the doctrine of state legislative immunity "was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation." The Court reiterated the reason for the immunity:

> The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. "In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence." II Works of James Wilson (Andrews ed. 1896) 38.

Id. at 373. As restated by this Court in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719, 731 (1980): "The purpose of this immunity is to insure that the legislative function may be performed independently without fear of outside interference." The Court went on to recognize that in the absence of the immunity legislators may be distracted and forced to direct their time, energy and attention from their legislative tasks. *Id.* at 733.

The importance of this issue has been recognized consistently by this Court. These decisions establish, first, that legislative immunity prohibits a federal grand jury from obtaining by subpoena documents from Congress and, second, that a state legislature should be treated no differently.

Both *Gravel v. United States*, 408 U.S. 606 (1972), and *Eastland v. United States Servicemen's Fund*, 421 U.S. 491

(1975), mandate protection of Congress from forced disclosure by grand jury subpoena of documents obtained in a congressional investigation. *Gravel*, 408 U.S. at 615, 616, 627, instructs that requiring a senator to respond to grand jury interrogation about a legislative act must be proscribed. None of the justices in *Gravel* doubted that a grand jury subpoena constitutes questioning prohibited by the Speech or Debate Clause.[2]

Eastland, 421 U.S. at 504, recognizes that a legislative investigation is well within the legitimate legislative sphere:

> The power to investigate and to do so through compulsory process plainly falls within [the definition of the "legitimate legislative sphere"]. This Court has often noted that the power to investigate is inherent in the power to make laws because "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." *McGrain v. Daugherty*, 273 U.S. 135, 175 (1927).

Accordingly, *Gravel* and *Eastland* establish that a subpoena for legislative papers commanding information obtained by congressional investigators is impermissible.

This proscription against grand jury inquiry is premised on the Speech or Debate Clause of the United States Constitution.[3] The principles supporting the Speech or Debate Clause also support legislative immunity for state legislators. As this Court noted in *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. at 732: "We have also recognized that state legislators enjoy common law immunity from liability for their legislative acts, an immunity that is similar in its origin and rationale to that accorded Congressmen under the Speech or Debate Clause."

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2. Rather, the justices disagreed as to whether the alleged activities of the senator should have been considered legislative acts immune from probing by a federal grand jury.

3. The Speech or Debate Clause of the United States Constitution, art. I, § 6, cl. 1, states: "for any Speech or Debate in either house, [the Members of Congress] shall not be questioned in any other place."

This and other courts have recognized that this similarity in origin and rationale mandates that legislative immunity should protect state legislators to the extent it protects members of Congress. This Court has consistently equated the legislative immunity to which state legislators are entitled to that accorded Congressmen under the Constitution, in actions premised upon 42 U.S.C. § 1983. *See Tenney v. Brandhove*, 341 U.S. at 367 (absolute immunity for state legislator from damages); *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (absolute immunity for regional legislator from damages); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. at 719 (absolute immunity for state judge acting in a legislative capacity from declaratory and injunctive relief). In so holding, the Court recognized that the need for independence of a state legislature is equally as important and deserving of respect as the need for Congressional independence:

> Indeed, we have recognized elsewhere that "a private civil action, whether for an injunction or damages, creates a distraction and forces [legislators] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland v. United States Servicemen's Fund, supra*, at 503. Although the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions, *United States v. Gillock*, 445 U.S. 360 (1980), we generally have equated the legislative immunity to which state legislators are entitled under §1983 to that accorded Congressmen under the Constitution.

Id. at 733. These cases establish both reason and precedent for equating state and federal legislative immunity.

The Court of Appeals' refusal to recognize any immunity eviscerates this centuries-old doctrine of legislative independence and ignores the reasons supporting the immunity. The Court of Appeals' decision now sanctions federal interference with an ongoing state legislative investigation. By subjecting such a committee to federal grand jury subpoenas during an

ongoing investigation, the Court of Appeals' decision inevitably results in a deterioration of the quality of the investigation and requires state legislators to focus on matters other than their proper functions: oversight and legislation.

Any legislative response to a subpoena necessarily involves this interference, with the concomitant delay and disruption of the legislative function. Compliance with a subpoena requires expenditure of money and manpower, both usually in short supply, that otherwise would be directed to the legislative investigation. The distraction of compliance is exacerbated if the subpoena commands the presence of legislators themselves before the grand jury in the midst of their legislative investigation.

The delay and disruption in a legislative investigation that concerned this Court in *Eastland*, 421 U.S. at 491, are especially acute where a legislature must, as in the case, litigate the subpoena by moving to limit or quash. The interference with the ongoing investigation is well illustrated in the case at Bar, where litigation of the propriety of the subpoena has for two years required legislators and their staff to focus on court proceedings rather than the legislative investigation.

The adverse consequences of compliance with or litigation of a subpoena may also discourage legislatures from forming investigative committees, discourage legislators from serving on these committees, and even discourage persons from serving as legislators if they may be summoned to appear before the grand jury at the whim of a United States Attorney. Indeed, the Court of Appeals' decision is a deterrence to proper investigations vital to effective legislating.

Just as important as the distraction, disruption and delay caused by the subpoena is the danger of abuse of power or harassment of the state legislature by a United States Attorney. Although Petitioners do not contend that there were improper motives in this case, this Court should consider not only "what has been, but . . . what may be." *Weems v. United States*, 217 U.S. 349, 373 (1910). A politically motivated, overly ambitious

or overzealous prosecutor could, pursuant to the Court of Appeals' ruling, either intentionally or unintentionally disrupt the state legislative process by serving subpoenas demanding the appearance of legislators and their staff and files before a grand jury at any time. Such abuse of power is facilitated by the virtually unlimited investigative powers of grand juries and their relaxed standards of materiality and relevance. *See Gravel*, 408 U.S. at 631 (Stewart, J., dissenting in part).[4]

Another profoundly harmful impact of the Court of Appeals' decision is that it may prevent the investigative committee from obtaining the broadest possible range of information in its oversight function. As stated by Justice Stewart in his dissenting opinion in *Gravel*, 408 U.S. at 630, information otherwise available to a legislator may not be forthcoming if the confidential identity of the source of the information will be passed on to a federal grand jury.

The threat to the independence of the state legislatures described in *Tenney v. Brandhove*, 341 U.S. at 367, and *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. at 719, is the very real and dangerous result of the Court of Appeals' decision. These precedents, which were ignored by the Court of Appeals, establish the necessity for legislative immunity and its special value in our system of government.[5]

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4. Harassment from a state executive or its agencies or departments is also foreseeable under the Third Circuit's decision. For example, a state executive official may persuade a United States Attorney to serve subpoenas on the legislative committee investigating the state executive official, the effect of which would be harassment of or interference with the committee.

5. The District Court held that the information requested by the United States Attorney from the state legislature was readily available from other sources. To overrule the policy reasons supporting an immunity protecting state legislatures where there is no need to do so is the ultimate denial of the independence of the state legislature and defeat of the state legislature's integrity.

B. The decision of the Court of Appeals conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits.

The decision below conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits that persuasively delineate the reasons for equating state and federal legislative immunity.

In *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), the court held that state and federal immunity from suit for injunctive relief and damages in a § 1983 action are congruent. Recognizing that the shared origins and justifications of the doctrines of common law immunity and the Speech or Debate Clause immunity "would render it inappropriate for us to differentiate the scope of the two without good reason," *id.* at 8, the court stated:

> Moreover, under our system of federalism, the role of the state legislature is entitled to as much judicial respect as that of Congress. Congress may legislate on matters of national concern, while state legislators act on vital matters of local importance. The need for a Congress which may act free of interference by the courts is neither more nor less than the need for unimpaired state legislatures. We show no more than "a proper respect for state functions," *Younger v. Harris*, 401 U.S. 37, 44, 91 S.Ct. 746, 750, 27 L.Ed.2d 669 (1971), in holding that state legislators must be accorded a privilege similar to that of federal legislators. "To create a system in which the Bill of Rights monitors more closely the conduct of state officials than it does that of federal officials is to stand the constitutional design on its head." *Butz v. Economou*, 438 U.S. 478, 504, 98 S.Ct. 2894, 2909, 57 L.Ed.2d 895 (1978).

Id. at 9. The Court concluded that "*Tenney* . . . demonstrates that the immunity of state legislatures must be recognized by us." *Id.*

The Third Circuit's decision also conflicts with the decision of the United States Court of Appeals for the First Circuit in *In*

re Hampers, 651 F.2d 19 (1st Cir. 1981). In *Hampers*, the court held that the Massachusetts Commissioner of Revenue would not be required to comply with a federal grand jury subpoena by virtue of a state nondisclosure statute cognizable in federal court pursuant to Federal Rule of Evidence 501. The court rejected the government's argument that the deference owed to the grand jury mandated rejection of the privilege, stating:

> [H]onoring such a privilege in federal court will usually involve some cost to the federal interest in seeking the truth in federal question cases. It makes a difference whether the federal interest in seeking full disclosure is a weak or strong one. . . . Assisting federal grand juries in their criminal investigations is generally a strong interest. But where the information sought is only corroborative of what investigators have alleged on the basis of other information, is seemingly ascertainable from sources other than state tax returns, and addresses only one aspect of a non-tax-related crime, the federal interest looms less.

Id. at 22.

Referring to the "value in preserving . . . the postures of comity and deference arising from federalism", *id.* at 23, the court concluded:

> We therefore hold that appellant in this case enjoys a qualified privilege under Rule 501 because of the state nondisclosure statute and that, in order to enforce a subpoena in federal criminal investigation, a federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of that crime, and that the same information or equally probative information can not be obtained elsewhere through reasonable efforts.

Id. The *Hampers* court's recognition of a privilege in the grand jury context and the importance of comity and federalism conflicts with the Third Circuit's rejection of legislative immunity in the case at Bar.

The decision of the Court of Appeals below in carving out a draconian and unwarranted exception to the doctrine of legislative immunity conflicts, not only in principle but in effect, with these decisions of the First and Second Circuit Courts that proscribe such interference with the state legislative process. Lower federal courts and the litigants before them need further direction from this Court on this important question of legislative immunity.

C. The decision of the Court of Appeals misconceives *United States v. Gillock*, 445 U.S. 360 (1980), the implications of which are in need of clarification by this Court.

The Court of Appeals expressly and erroneously relied on this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), as foreclosing legislative immunity for state legislators:

> Our survey of the suggested rationales for the speech or debate privilege for members of Congress convinces us that after *Gillock* even a qualified speech or debate privilege for state legislators would not realistically serve the purposes that the Speech or Debate Clause is intended to advance. Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause. We therefore refuse to recognize such a privilege; hence we reject the underlying rationale for the District Court's decision.

Appendix A at 21a. The Court of Appeals' reliance on *Gillock* misconceives the meaning and misapprehends the scope of *Gillock* and points to the urgent necessity for clarification of that case by this Court.

This Court in *Gillock* did not speak to the doctrine of legislative immunity urged by Petitioners in this case. Rather, the issue in *Gillock* was whether an evidentiary privilege cognizable under Rule 501 of the Federal Rules of Evidence or the federal common law should bar the introduction of evidence of the legislative acts of a state legislator charged with taking

bribes or otherwise obtaining money unlawfully through exploitation of his official position. *Id.* at 362. The prosecutors intended to use evidence of the legislator's criminal actions in a criminal trial of the legislator. Recognition of the evidentiary privilege urged by the legislator would have resulted in suppression of all evidence relating to the state legislator's corrupt legislative activities.

On the facts before it, this Court rejected Gillock's claim that a federal common law evidentiary privilege supported suppression of the evidence.[6] First, the Court stated that one rationale supporting the Speech or Debate Clause, "the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch," *id.* at 369, "resting solely on the separation of powers doctrine, gives no support to the grant of a privilege to state legislators in federal criminal prosecutions." *Id.* at 370. Next, the Court analyzed the second rationale underlying the Speech or Debate Clause: the need to insure legislative independence. The *Gillock* Court recognized this Court's sensitivity to such interference in *Tenney v. Brandhove*, 341 U.S. at 367, but stated that:

> [R]ecognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process.

Gillock, 445 U.S. at 373.

The reach of *Gillock* does not extend to the situation at Bar. Even the Court of Appeals recognized the differences between this case and *Gillock*:

> We agree with the district court that *Gillock* did not by its terms foreclose all possible forms of privilege for state legislative activity. *Gillock* made clear the importance the

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6. Speaking to Gillock's contention that the Court should construct a Rule 501 evidentiary privilege, the Court foreclosed recognition of the privilege on that ground, holding that the "language and legislative history of Rule 501 give no aid to Gillock." *Id.* at 367.

> Supreme Court attached to the criminal context in which the case arose. Furthermore, the federal interest was obviously vital in that case because, in the Court's own terms, the privilege sought by Gillock threatened to immunize conduct proscribed by Congress. In contrast, the interest in enforcing the subpoena in this case is less crucial.

Appendix A at 15a. In *Gillock*, recognition of an evidentiary privilege would have completely immunized the state legislator from criminal liability, and the Court recognized the importance of the criminal context in which the question was presented. The situation presented here, however, does not arise in this criminal context.[7] The federal interest in the case at Bar is much less crucial, and the impact on the legislature is much more disastrous than that resulting from rejection of the evidentiary privilege sought by Gillock.

The intrusive impact on a state legislature of a subpoena directed to a legislative committee during an ongoing legislative investigation, as in this case, dwarfs any adverse consequences from the introduction into evidence of corrupt public acts by an indicted legislator, as was the case in *Gillock*. There, introduction into evidence of the public criminal acts of the indicted state legislator had little, if any, impact on the legislative institution, since most were public acts that were documented in the public record. In the present situation, the entire legislative body is disrupted; for example, confidential relationships and communications are exposed and state legislative records are removed from the legislature during public hearings.

The Court of Appeals misapplied the analysis and misapprehended the scope of *Gillock* in relying on the case to reject the legislative immunity urged by Petitioners. In light of this Court's long-standing recognition of the importance of legislative immunity to both state and federal legislators, *Gillock*

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7. *Shillitani v. United States*, 384 U.S. 364, 368-71 (1966), establishes that proceedings involving failure to comply with a grand jury subpoena are civil rather than criminal. *See also* 28 U.S.C. § 1826; *In re Grand Jury Investigation*, 600 F.2d 420 (3d Cir. 1979).

should not be read so broadly as to mandate rejection of the immunity here. This case demonstrates the need to clarify *Gillock* so that it may not be used by the lower federal courts to eviscerate this immunity and its special value in our system of government.[8]

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8. The need to clarify the scope of *Gillock* is exemplified by the decision of the United States Court of Appeals for the First Circuit in *Hampers*, 651 F.2d at 19. The *Hampers* court's analysis of *Gillock* is diametric to that of the Third Circuit in this case and establishes the need for clarification of *Gillock* by this Court:

> The United States stresses particularly the Supreme Court's refusal in *United States v. Gillock*, 445 U.S. 360, 100 S.Ct. 1185, 63 L.Ed.2d 454 (1980), to recognize a privilege for state legislators paralleling that of United States Senators and Congressmen. *Gillock*, however, is distinguishable in at least two significant respects: first, the state provision at issue was in terms a limit only on the prosecution powers of the state; second, the federal interest there included a federal criminal statute whose very purpose might have been frustrated by recognition of the privilege asserted. *Id.* at 374, 100 S.Ct. at 1193, 1194.

Hampers, 651 F.2d at 22 n. 3.

CONCLUSION

For the foregoing reasons, Petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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October 2, 1987

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-5144

IN RE: GRAND JURY

IN THE MATTER OF:
GRANITE PURCHASES FOR
STATE CAPITAL - GRAND
JURY SUBPOENA NUMBER 86-1

United States of America,

Appellant

On Appeal from the United States
District Court for the
Middle District of Pennsylvania
(D.C. Misc. No. 86-027)

Argued August 19, 1986

Submitted Following Remand
Pursuant to Third Circuit Rule 12(6)
March 5, 1987

Before: BECKER and MANSMANN,
Circuit Judges and
TEITELBAUM, *District Judge**

(Filed June 9, 1987)

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* The Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

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OPINION OF THE COURT

BECKER, *Circuit Judge*.

The Chairman of an investigative committee of the Pennsylvania House of Representatives and other leaders of the House ("the Legislators") have refused to comply with a federal grand jury subpoena seeking certain records of the committee's investigation into alleged contractual fraud.[1] They assert a common law speech or debate privilege for state legislators cognizable in federal courts under Federal Rule of Evidence 501. On the basis of this asserted privilege, they petitioned the district court to quash the subpoena. Applying a balancing test to the competing interests, the district court granted much of

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1. The subpoena principally seeks notes, summaries and transcripts of witness interviews.

the requested relief. The United States, acting for the grand jury, now appeals.

In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court rejected a claim that a speech or debate privilege prevents a prosecutor from using evidence of a state legislator's legislative acts in a prosecution against him. The Legislators and the district court believe that *Gillock* is distinguishable because it involved a more compelling federal interest than that at stake in this case; essentially they claim that *Gillock* rejected only an absolute privilege and does not preclude a qualified speech or debate privilege that protects the documents requested here.

Gillock, however, was not based on a general balancing of competing interests that may differ from case to case. Instead, the Supreme Court engaged in a particularized analysis of whether the interests protected by the Constitution's Speech or Debate Clause justify extension of that protection to state legislators. An analysis along the lines suggested by *Gillock* leads also to rejection of a qualified privilege. Neither the threat of harassment by the federal executive or judiciary, nor the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause.

Although we do not foreclose the possibility of a qualified privilege limited only to confidential deliberative communications, that issue is not squarely before us on the present record. The district court erred in concluding that the records at issue were insulated from production by a qualified privilege. Its order limiting the subpoena will therefore be reversed.

I. *FACTS AND PROCEDURAL HISTORY*

In early 1985, a select committee of the Commonwealth of Pennsylvania's House of Representatives (the "Committee") began an investigation into alleged improprieties, including payoffs, in the procurement of granite for an expansion of the state capitol in Harrisburg. The Committee reviewed numerous

documents. It also interrogated witnesses in both open and closed session and through its investigators, in the process generating transcripts, summaries, notes and memoranda of its interviews.

In January, 1986, at the suggestion of the Pennsylvania Department of General Services, the United States Attorney for the Middle District of Pennsylvania convened a grand jury to investigate the same occurrences. Shortly thereafter, agents of the FBI met with Representative Nicholas Colafella, Chairman of the Committee, and with Committee counsel Reizdan Moore. These men advised the agents generally of the progress of the investigation but confined themselves essentially to matters of public record. Although Moore stated in an affidavit submitted to the district court that he had disclosed his impressions about potential sources of evidence and the Committee's intentions regarding certain witnesses, Colafella and Moore denied the agents access to documents, transcripts and notes not yet made public. Colafella and Moore also refused to reveal the names of many witnesses, the substance of what they said or whether they may have committed any federal crimes.

On January 15, 1986, following this interview, the U.S. Attorney caused a grand jury subpoena duces tecum to be directed to Representative Colafella or the records custodian of the Committee, demanding production of the following documents:

> All records in your care, custody and control relating to an investigation of the purchase of granite use [sic] in the Capitol addition project as follows:
>
> 1. Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individuals and companies named on the attached list [omitted].

> 2. Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts summaries, agenda or minutes during testimony or in comments by committee members or staff.

The subpoena also stated that in lieu of personal appearance, the documents could be mailed to the U.S. Attorney's office.

Colafella responded by moving to quash the subpoena, asserting that he need not produce the records because of a federal common law speech or debate privilege for state legislators under Federal Rule of Evidence 501. With the consent of the United States Attorney, several legislators were permitted to intervene in alignment with Colafella, including the Speaker of the Pennsylvania House of Representatives, the majority and minority leaders and the Bipartisan Committee for the Administration of the House. The district court held an immediate hearing, and the parties stipulated to many facts including the fact that no legislator was then a subject or target of the investigation.

Much of the hearing focused on the nature of the documents sought by the subpoena and whether they would reveal the thought processes of legislators or their aides. The U.S. Attorney repeatedly stated that he sought only "hard" evidence:

> . . . I am basically asking for . . . investigative reports of interviews conducted with yet other individuals and the sworn testimony of other individuals whether taken publicly or in executive session. I want no attorney-client privilege nor do I ask that the grand jury be tainted by documents that are privileged in any other manner including legislative thought processes or work processes.

The Legislators informed the court that the Committee had already made many of the transcripts and documents public, but the U.S. Attorney rejoined: "It is my belief that there are additional documents and interviews which have not been made public which are vital and relevant. If it could be represented

that there are not, I would withdraw my subpoena and abide the event."

The Legislators responded that the documents sought would in fact reveal the thought processes of committee members and their aides. The Legislators argued that the revelation of thought processes significantly impinged on legislative independence and the values of federalism. Moreover, the Legislators claimed that the supoena did not further significant federal interests in law enforcement because: (1) most of the subpoenaed information was obtainable by the Grand Jury from other sources, and (2) the fact that no legislator was under investigation indicated that the Grand Jury sought to use the Committee merely as its investigative tool.

Following oral argument and full briefing, the district court agreed substantially with the Legislators. The court adopted a general balancing approach to the privilege question and essentially accepted the Legislators' evaluation of the competing interests. The court therefore quashed the subpoena in most particulars. The Legislators remained obligated only to disclose the identity of committee witnesses and to produce documents which the Committee had not itself authored if the Grand Jury could demonstrate that they were unobtainable through other means.

The district court entered its order on January 31, 1986. On February 6, the Committee released numerous documents to the public and sent copies of these documents directly to the U.S. Attorney. The U.S. Attorney did not believe that these documents included all those within the reach of the subpoena and therefore appealed to this court. When the Legislators filed their brief, however, they appended an affidavit by Committee Counsel Moore which stated that "all relevant or remotely relevant information regarding payoffs which was obtained on or before February 6, 1986, has been released to the public and turned over to the United States Government . . . ."

The case was listed for oral argument. In view of the Moore affidavit, the panel was concerned whether a viable case or controversy existed and inquired whether any documents sought by the subpoena remained unproduced. The ensuing

colloquy did not resolve the question. At the conclusion of oral argument, the panel suggested to counsel that they attempt to resolve their differences and report to the Court in writing. However, the parties remained unable to settle their dispute or even to agree whether documents subject to the subpoena remained unproduced. Uncertain whether the case was or was not moot, the panel retained jurisdiction but remanded the matter to the district court for a determination of mootness.

The district court received supplemental submissions and determined that "a case or controversy still exists." The court found that the Committee had not released several specific items "which fall within the scope of the subpoena:"

> 1) memorandums, summaries of interviews, interview notes, reports of interviews with Carl Lunderstadt, John Scott, Robert Billingsly, Mr. Bernardo.
>
> 2) memorandums, summaries, notes, reports of interviews of potential witnesses interviewed by the committee's investigator, Stanley Gochenour and the commiitee's attorney, Reizdan Moore.

The district court also found that the Legislators did not have to produce these items under the terms of its previous order quashing most of the subpoena's request.

The case has now returned to us from the district court, and we have received supplemental submissions. Despite the district court's findings, the Legislators continue to press a claim of mootness. They argue first that the U.S. Attorney effectively modified the subpoena by stating to the district court that he would withdraw the subpoena if the Legislators represented that all vital and relevant documents and interviews had been made public. The Legislators contend that they have complied with this modified subpoena through Moore's representation that "all relevant or remotely relevant information" has been turned over to the government. The Legislators additionally claim mootness because the Committee ceased functioning on November 26, 1986 when the legislature expired to be replaced by a newly

elected legislature. As of that day, the Legislators claim, Representative Colafella no longer had authority to produce the documents requested by the subpoena.

In addition to these mootness claims, the parties have reasserted their previous arguments on the merits.

II. *MOOTNESS*

The Legislators' suggestion that they have complied with the subpoena by providing the statement requested by the U.S. Attorney amounts to a kind of compliance by estoppel argument. Even assuming the viability of such a theory, however, one requirement of any estoppel claim is a showing of detrimental reliance. The Legislators have not explained how they relied on the U.S. Attorney's statements to their detriment.

Futhermore, the U.S. Attorney stated that he would be satisfied only if the Legislators represented that no relevant "documents or interviews" remained unavailable. Moore's affidavit referred only to "relevant information." The district court has specifically found that the Legislators have not turned over many relevant documents. This finding indicates at the least that Moore's view of "relevant information" does not conform to the U.S. Attorney's understanding of all relevant "documents." It further indicates that documents sought by the subpoena remain unproduced. Because the Legislators do not challenge that finding as unsupported, we must agree with the district court that the Legislators have not complied with the subpoena; hence the case is not moot on the ground of compliance.

The Legislators' second claim of mootness, lack of possession or legal control, is equally without merit. A party's lack of possession or legal control over documents requested by a subpoena is normally a valid defense to a subpoena and justification for a motion to quash. But such a defense presents a question on the merits not one of mootness. *See In the Matter of Grand Jury Impaneled January 21, 1975 (Freedman & Cortese)*, 541 F.2d 373, 377 (3d Cir. 1976) (treating claim of lack of legal authority to produce records as question of the merits). Moreover, it may involve a number of factual disputes, and to succeed on such a defense, Representative Colafella has the burden of

producing at least some evidence that he does not have possession or control of the documents sought. *See McPhaul v. United States*, 364 U.S. 372, 378-79 (1960) (party claiming lack of control as defense to congressional subpoena duces tecum must testify that he does not possess or control records); *United States v. O'Henry's Film Works, Inc.*, 598 F.2d 313, 318 (2d Cir. 1979) ("[W]hen the agent fails to produce documents that are the subject of a valid summons or subpoena, if called before a court, he must give sworn testimony that he does not possess them."). The Legislators have offered no evidence whatsoever, and we will not postpone our consideration of the district court's order because of unsubstantiated allegations that might support a separate, independent, ground for quashing the subpoena.[2] We therefore turn to the merits.[3]

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2. The Legislators' "lack of possession" defense also raises several difficult legal issues including: the effect of the change in status during the pendency of the litigation; the effect of the subpoena's direction not only at Colafella but also at the "Records Custodian;" the effect of the subpoena's direction not only at Colafella but also at the "Records Custodian;" the effect of the intervention of the Bi-Partisan Committee for the Management of the House, which appears to have statutory authority over all house records, *see* 46 Penn Stat. Ann. §42.121b(a)(11) (Purdon's Supp. 1986); and the applicability of Federal Rule of Civil Procedure 25(d)(1), which permits automatic substitution of one government officer with his successor. All of these issues, which provide possible responses to the lack of possession defense, may properly be raised in the district court if the Legislators choose to pursue their claim that the subpoena is unenforceable because Colafella no longer has control over the documents.

3. Prior to oral argument, we directed the parties to address the standing of the intervenors to press a legislative privilege claim inasmuch as the documents requested did not reflect the intervenor's own legislative communications or activities. We did so because of precedent suggesting that "the purpose of the Speech or Debate Clause is to protect the individual legislator, [although] not simply for his own sake, but to preserve the integrity of the legislative process." *United States v. Brewster*, 408 U.S. 501, 524 (1972). Whether the intervenors have standing, however, depends on the scope of the privilege, and we cannot determine the scope of a hypothetical privilege if it does not exist. Because we must determine whether the privilege exists before determining its scope, we necessarily assume the standing of all appellees to claim the privilege and proceed to a discussion of the merits.

III. *THE MERITS*

A. *Introduction*

A grand jury exercises broad investigative powers and generally has both the right and the duty to procure every man's evidence. *United States v. Dionisio*, 410 U.S. 1, 9-10 (1973). This power is limited only by constitutional, common law or statutory privilege, or by the exercise of the district court's supervisory authority to "quash or modify the subpoena if compliance would be unreasonable or oppressive." Fed. R. Crim. P. 17(c); *see Branzburg v. Hayes*, 408 U.S. 665, 668 (1972). While appellate courts will normally defer to the district court's exercise of its supervisory authority, *see In re Grand Jury Proceedings (Schofield II)*, 507 F.2d 963, 967 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975); *In re Grand Jury Matters (Young)*, 751 F.2d 13, 16 & n.3 (1st Cir. 1984), "[j]udges may not, in the guise of exercising supervisory power, create new privileges or enlarge or distort existing ones," *Young*, 751 F.2d at 18. The existence and scope of a privilege are questions of law which Congress has directed courts to consider "in the light of reason and experience." Fed. R. Evid. 501.

Because the district court relied on a theory of a common law speech or debate privilege for state legislators, we must reverse its order if the district court's understanding of the privilege was in error. To analyze that question, we must first discuss the contours of the speech or debate privilege for members of Congress, for the Legislators' contend that the same or similar interests motivating that privilege justify a comparable, albeit qualified, privilege for state legislators. We then analyze the Supreme Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), and the district court's reasons for distinguishing it. Finally, we apply the lessons of *Gillock* to decide whether we should recognize the qualified privilege claimed in this case.

B. *The Federal Congressional Privilege and Gillock*

The speech or debate privilege for members of the United States Congress has its source in the Speech or Debate Clause of

the Constitution, Art. I., §6, cl. 1. Its " 'central role'. . . is to 'prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary.' " *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 502 (1975) (*citing Gravel v. United States*, 408 U.S. 606, 617 (1972)). It also prevents disruption of Congressional operations by preventing distractions or interference with ongoing activity. *See id.* at 510 n.16 ("Where we are presented with an attempt to interfere with an ongoing activity by Congress . . .[t]he speech or debate protection provides an absolute immunity from judicial interference.") The Speech or Debate Clause accomplishes these goals primarily by providing Congressmen and their aides with absolute immunity from criminal or civil suit, *see Gravel*, 408 U.S. at 615-16 (criminal); *Eastland*, 421 U.S. at 503 (civil), for "acts that occur in the regular course of the legislative process," *United States v. Brewster*, 408 U.S. 501, 525 (1972).

In order to insure that Congressmen are not held liable for legislative acts, the Speech or Debate Clause mandates an evidentiary privilege that prohibits evidence of a Congressman's acts from being used in a proceeding against him. *See United States v. Helstoski*, 442 U.S. 477, 488-89 (1979). Because "hostile questioning by the executive branch before a possibly hostile judiciary," may also impinge on legislative independence, *In re Grand Jury Investigation ("Eilberg")*, 587 F.2d 589, 597 (3d Cir. 1978), the speech or debate privilege is also testimonial and protects a Congressman or his aides from judicial questioning about his legislative acts, *Gravel*, 408 U.S. at 415-16; *Eilberg*, 587 F.2d at 596.

Both prongs of this evidentiary privilege have two crucial features. First, in keeping with the broad scope of Congressional immunity, the evidentiary privilege applies broadly to evidence or testimony about all "acts that occur in the regular course of the legislative process." *Brewster*, 408 U.S. at 525. It therefore applies to activity taken in the course of legislative factfinding. *Eastland*, 421 U.S. at 504-05 (1975); *see also Government of the*

Virgin Islands v. Lee, 775 F.2d 514, 521 (3d Cir. 1985).[4] Second, the speech or debate privilege is "absolute;" hence, it cannot be overcome by any countervailing interest no matter how strong. *Eastland*, 421 U.S. at 510 n.18.

For many years, courts of appeals differed over the recognition of a speech or debate privilege for state legislators. Some courts held that because the evidentiary privilege for Congressmen exists primarily to protect Congressional immunity, a comparable evidentiary privilege for state legislators, who lack this immunity, made little sense. *See e.g., United States v. Craig*, 537 F.2d 957 (7th Cir.) (en banc), *cert. denied*, 429 U.S. 973 (1976); *United States v. DiCarlo*, 565 F.2d 802, 807 (1st Cir. 1977), *cert. denied*, 435 U.S. 924 (1978). In contrast, a panel of this court recognized the privilege because of the historically accepted view that "a legislature will function better in the public interest with the protection than without it." *In re Grand Jury Proceedings (Cianfrani)*, 563 F.2d 577, 583 (3d Cir. 1977). This conflict between the circuits was resolved by the Supreme Court in *United States v. Gillock*, 445 U.S. 360 (1980).

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4. Although the speech or debate privilege applies to legislative factfinding, it is by no means clear that the privilege would bar this subpoena even were it directed at members of Congress. Our precedents have suggested that the privilege is primarily one of non-evidentiary use, not one of non-disclosure. *See Lee*, 775 F.2d at 523; *Eilberg*, 587 F.2d at 595-96 (suggesting that documents memorializing legislative activities may be usable against third parties); see discussion *infra* of confidentiality concerns at typescript 27-29. Furthermore, at least one court originally upheld a subpoena for records compiled by a joint investigation of an agency and a Congressional committee after that investigation had ended despite a Speech or Debate Clause challenge. *Paisley v. C.I.A.*, 712 F.2d 686, 696-97 (D.C. Cir. 1983). That portion of the opinion was later vacated because the court found that it did not have to reach that matter 724 F.2d 201, 204 (D.C. Cir. 1984).

An analysis of the privilege for members of Congress, however, inevitably involves constitutional concerns. In contrast, an analysis of the privilege for state legislators involves only the federal common law of evidence. To avoid resolving constitutional questions unnecessarily, we restrict our attention only to the privilege claim of state legislators.

In *Gillock*, the Supreme Court considered whether a common law speech or debate privilege barred federal prosecutors from introducing evidence of a Tennessee state representative's support for particular legislation in a prosecution against the representative for bribery.[5] Chief Justice Burger's decision for the court separated the purposes of the speech or debate privilege into "[t]wo interrelated rationales . . . : first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence." 445 U.S. at 369.

The interest in preventing intrusion, the Court held, provides no support for a privilege for state legislators in federal cases because the Federal Government has supremacy over state legislatures in areas where the Constitution grants it power to act. Although the Court noted that interests of comity and federalism "command careful consideration," 445 U.S. at 373, it held that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch," 445 U.S. at 370 (citations ommitted), and could not justify the privilege requested in that case.

Turning to the second rationale, the interests in legislative independence, the Court recognized that "denial of a privilege to a state legislator may have some minimal impact on the exercise of his legislative function" and that interests of comity commanded some concern for this impact. 445 U.S. at 373. But the court noted that it had traditionally drawn the line at protection of state legislators in civil suits. The courts have no power, it reasoned, through the creation of an evidentiary privilege "to immunize criminal conduct proscribed by an Act of Congress." 445 U.S. at 372 (emphasis omitted)(*citing Gravel*,

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5. *In United States v. Brewster*, 408 U.S. 501 (1972), the Supreme Court held that the Speech or Debate Clause did not protect a member of Congress from prosecution for accepting a bribe in return for a promise of a legislative act. That case, however, did not permit evidence of the actual legislative act to be used against the Congressman. Thus, if Gillock had been a member of Congress, evidence of the legislative activity would have been inadmissible against him. *Gillock*, 445 U.S. at 367.

408 U.S. at 627). Accordingly, the Court held that no common law speech or debate privilege bars federal authorities from using evidence of legislative acts in prosecutions against state representatives.

C. *The Reasoning of the District Court*

The district court distinguished *Gillock* on the grounds that the need to use evidence of legislative acts against the Tennessee representative provided a more compelling federal interest than the need in this case to obtain evidence from a state legislator that is independently obtainable. In doing so, the district court essentially read *Gillock* as denying state legislators only an absolute speech or debate privilege. In the implicit reasoning of the district court, *Gillock* did not preclude a qualified speech or debate privilege for state legislators, i.e., a privilege applicable to the full range of legislative activities normally protected by the Speech or Debate Clause for members of Congress but, when claimed by state legislators, surmountable by a federal prosecutor's particularized showing of need.

Having distinguished *Gillock* to its satisfaction, the district court proceeded to balance the competing interests of federal law enforcement and state legislative independence in this particular case to decide whether it should uphold the privilege claim. On the federal side, the court noted that the grand jury could obtain virtually all the information it sought from an independent investigation and that no state legislator was a target of the investigation. On the side favoring the privilege, the district court placed "the integrity of the legislative process." Balancing these interests, the court held "that the policy underlying the asserted privilege outweighs that favoring disclosure" and thus justifies the protection requested by the Legislators. Only if the Grand Jury could demonstrate a particularized need for a specific document by showing that it could not obtain the document through another source would the district court be prepared to command compliance with the subpoena.

We agree with the district court that *Gillock* did not by its terms foreclose all possible forms of privilege for state legislative activity. *Gillock* made clear the importance the Supreme Court attached to the criminal context in which the case arose. Furthermore, the federal interest was obviously vital in that case because, in the Court's own terms, the privilege sought by Gillock threatened to immunize conduct proscribed by Congress. In contrast, the interest in enforcing the subpoena in this case is less crucial. The subpoena will assure the Grand Jury all the hard evidence obtained by the Committee, and the statements obtained by the Committee when the trail was fresh may provide insights not available later on or may provide important corroboration. Recognition of the privilege, however, is unlikely to thwart the investigation entirely. In light of this difference, the district court was correct not merely to cite *Gillock* and to forego all further analysis but instead to evaluate the request for a qualified privilege with the additional use of its "reason and experience." Fed. R. Civ. P. 501, *see* typescript *supra* at 14.

Notwithstanding differences between this case and *Gillock*, we disagree with the district court's method of analysis in three important respects. First, the district court analyzed the Legislators' privilege request entirely in the context of this case. Such a narrow focus was in error because a court must first decide whether a qualified privilege exists or should exist before deciding how to apply it to a particular case.

By insisting on a two-step process, courts guide their discretion with rules developed from accumulated wisdom about the situations that justify a privilege. The requirement of general privilege rules also enables private actors to rely on those rules and thereby to engage more freely in the conduct privileges aim to encourage. Thus, although the concept of the qualified privilege permits courts to uphold or reject privilege claims in light of the particulars of an individual case, the decision to recognize a qualified privilege must still follow from a more broad-based view of how the privilege will work in general.

Second, although all privilege analysis involves some balancing, we disagree with the abstract nature of the district court's balancing approach. Common law privileges should be

"accepted 'only to the very limited extent that permitting a refusal to testify or excluding relevant evidence has a public good transcending the normally prudent principle of utilizing all rational means for ascertaining truth.' " *United States v. Trammell*, 445 U.S. 40, 50 (1980) (citations omitted). The justification for a privilege must be specific, for courts should apply privileges "only to the extent necessary to achieve their purpose." *Freedman & Cortese*, 541 F.2d at 382 (*citing Fisher v. United States*, 425 U.S. 391, 403 (1976)).

In *Trammell*, for example, the Supreme Court rejected the historically accepted privilege that permitted one spouse to exclude the testimony of the other despite the claim that it fostered "the harmony and sanctity of the marriage relationship." *Trammell*, 445 U.S. at 44.[6] The court found that the asserted benefit rested on a generalization and not on the required, sound, practical explanation of how the privilege would protect the relationship, *id.* at 51-53. Similarly here, the district court should not have terminated its analysis with the assertion of the need for "legislative independence" but should have examined more specifically how a common law speech or debate privilege would realistically assist legislators to perform their function.

Finally, we do not believe the district court's efforts merely to distinguish *Gillock* paid proper respect to its significance. Gillock's reasoning undercuts the weight we may accord interests of comity and federalism, and *Gillock's* practical impact undermines the extent to which recognition of a speech or debate privilege for state legislators may realistically further the interests that the privilege has traditionally safeguarded. To analyze the Legislators' claim, we must evaluate the specific reasons for and against a qualified speech or debate privilege in light of the theoretical and practical limitations imposed by *Gillock*.

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6. This privilege was distinct from the privilege, left intact by *Trammell*, which permits one spouse to refuse to testify against the other spouse.

D. *Analysis of Qualified Speech or Debate Claim in Light of* Gillock

As we have discussed, the core rationale for the speech or debate privilege has traditionally been the protection of legislative independence through a "prophylactic" rule assuring members of Congress that their legislative activities cannot lead to harassment by the executive or the judiciary. *United States v. Johnson*, 383 U.S. 169, 182 (1966); *see also Eastland*, 421 U.S. at 502. The need to prevent this harassment has overridden the danger of legislative misconduct inadvertently protected by the privilege. *See Brewster*, 408 U.S. at 516. *Gillock* made clear, however, that the concern with potential harassment rests on an underlying concern for maintenance of the separation of powers. 445 U.S. at 370. Federalism and comity do not raise the same concerns because the Supremacy Clause sanctions "interference" with state legislatures by the federal executive and judiciary so long as they pursue legitimate federal aims. Accordingly, *Gillock's* reasoning suggests that prevention of intimidation is simply not a legitimate rationale for extension of the privilege to state legislators.

As a practical matter, *Gillock's* holding also makes the prevention of intimidation and harassment impossible. The greatest potential for intimidation, of course, lies in the power of the federal government actually to prosecute legislators for their actions. The prophylactic function of the privilege is therefore undermined once federal officials may prosecute legislators for their legislative acts and obtain and use evidence of legislative acts for that purpose. Although the federal government may have less interest in intruding on state legislative functions when no misconduct is alleged, a qualified privilege that gives way when misconduct is alleged cannot insulate state legislators from intimidation. A qualified privilege therefore cannot serve a purpose for state legislators similar to that which lies at the core of the privilege for members of Congress.[7]

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7. The Supreme Court has engaged in a similarly practical analysis of the potential for harassment in rejecting the contention that the speech or debate

(*Footnote Continued*)

In addition to this core rationale, *Gillock* also recognized that legislative independence may in some senses be unrelated to the threat of intimidation. Even apart from the potential impact federal intimidation may have on a legislator's activity, a subpoena may burden a state legislator with onerous production requirements or may force a state legislator to disclose confidential communications. Having found that the core rationale is inapplicable here, we must still examine whether these threats to the functioning of the legislature justify creation of a qualified privilege that may apply to cases in which the federal interest is less compelling than it was in *Gillock*.

We certainly agree that a subpoena directed at the records of an ongoing legislative investigation could be unduly burdensome and may intrude on important legislative interests. We take this problem seriously because the citizenry not only has a strong interest in the success of federal criminal prosecutions to punish and to deter misconduct, but also a strong interest in the success of state legislative investigations that may lead to changes preventing future misconduct. Furthermore, the burden on legislators is a speech or debate concern. The Supreme Court has held analogously that the Speech or Debate Clause shields Congressmen from suit to block a Congressional subpoena because making the legislators defendants "creates a distraction and forces Members [of Congress] to divert their time, energy, and attention from their legislative tasks to defend the litigation." *Eastland*, 421 U.S. at 503.

We do not believe, however, that a state legislator's interest in avoiding the burdens of compliance with a subpoena is alone sufficient to justify creation of a speech or debate privilege.

(Footnote Continued)
privilege barred prosecution of a member of Congress for accepting a bribe in return for the promise of a legislative act:

> But if the Executive may prosecute a Member's attempt, as in *Johnson*, to influence another branch of the Government in return for a bribe, its power to harass is not greatly enhanced if it can prosecute for a promise relating to a legislative act in return for a bribe.

Brewster, 408 U.S. at 524.

Gillock instructs us that any such privilege must be qualified, not absolute, and must therefore depend on a balancing of the legitimate interests on both sides. Yet Rule 17 of the Federal Rules of Criminal Procedure already authorizes a district court to quash or modify a subpoena that is unreasonable or oppressive. That rule permits the district court to protect state legislators from undue disruption of their activities while still accommodating the need for information by the party issuing the subpoena. Interests of comity and federalism require that a district court respect the needs of state legislators, but Rule 17 continues to be the proper vehicle for accommodating the competing interests.

The state legislator's need for confidentiality is more troublesome. As a panel of the District of Columbia Circuit has noted, the legislator's need for confidentiality is similar to the need for confidentiality in communications between judges, between executive officials, and between a President and his aides. *See Nixon v. Sirica*, 487 F.2d 700, 717 (D.C. Cir. 1973). The need for a full, frank exchange of ideas has led courts to recognize qualified privileges for each of these governmental decisionmakers. *See, e.g., United States v. Nixon*, 418 U.S. 683, 708 (1974) (recognizing privilege for Presidential communications because "[a] President and those who assist him must be free to explore alternatives in the process of shaping policies and making decisions and to do so in a way many would be unwilling to express except privately"); *United States v. Weber Aircraft*, 465 U.S. 792, 802 (1984) (recognizing privilege for executive officials because history of governmental privileges "recognizes a need for claims of privilege when confidentiality is necessary to ensure frank and open discussion and hence efficient governmental operations") (citations omitted); *In Certain Complaints Under Investigation by an Investigating Committee of the Judicial Council of the Eleventh Circuit ("Hastings")*, 783 F.2d 1488, 1519 (11th Cir.), *cert. denied*, 106 S. Ct. 3273 (1986) (recognizing judicial privilege because "[j]udges, like Presidents, depend upon open and candid discourse with their colleagues and staff to promote the effective discharge of their duties.").

Even while granting governmental officials a qualified, confidentiality privilege, however, the courts have taken pains to insure that the privilege applies only "to the very limited extent" that the "public good" in confidentiality transcends the value of "utilizing all rational means for ascertaining truth." *Trammell*, 445 U.S. at 50 (quotation omitted). *In Nixon*, for example, the enormous importance and sensitivity of the President's personal communications motivated the Supreme Court to hold that these communications are "presumptively privileged," requiring the prosecutor to make a threshold showing of need and permitting the prosecutor access only to relevant, admissible evidence. *Nixon*, 418 U.S. at 713-16. However, the Court held that the President's "generalized interest in confidentiality," *id.* at 713, could not prevail over the need for "evidence that is demonstrably relevant in a criminal trial," *id.* at 712.

When dealing with lesser governmental officials, courts have treated claims of privilege even more strictly. They have required a threshold showing that communications of executive or judicial officials involve confidential deliberations about the decisions entrusted to them before those communications become presumptively privileged. *See, e.g., Hastings*, 783 F.2d at 1520-22 (11th Cir. 1986) (judicial privilege applies only upon showing that matters under inquiry implicate communications among a judge and his staff concerning performance of judicial business "such as . . . the framing and researching of opinions, orders and rulings"); *N.L.R.B. v. Sears, Roebuck & Co.*, 421 U.S. 132, 150-54 (1975) (executive privilege for agency officials applies only to documents "reflecting advisory opinions, recommendations and deliberations comprising part of a process by which governmental decisions and policies are formulated") (*quoting Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena*, 40 F.R.D. 318, 324 (D.D.C. 1966).

These precedents reflect the judicial reasoning and experience required by Rule of Evidence 501. In accordance therewith, we do not believe that the needs of state legislators for confidentiality justify the creation of a qualified privilege for the full range of legislative activities normally protected by the

Speech or Debate Clause. Not all acts "that occur in the regular course of the legislative process," *Brewster*, 408 U.S. at 525; will involve confidential communications, and many communications actually made in confidence have only limited need for confidentiality. For this reason, our prior decisions have recognized that confidentiality does not lie at the root of the concerns motivating a privilege for all legislative speech or debate. The spech or debate privilege is at its core a "use privilege" not a privilege of nondisclosure. *See Government of Virgin Islands v. Lee*, 775 F.2d 514, 523 (3d Cir. 1985); *In re Grand Jury (Eilberg)*, 587 F.2d 589, 595-96 (3d Cir. 1978).

Our survey of the suggested rationales for the speech or debate privilege for members of Congress convinces us that after *Gillock* even a qualified speech or debate privilege for state legislators would not realistically serve the purposes that the Speech or Debate Clause is intended to advance. Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause. We therefore refuse to recognize such a privilege; hence we reject the underlying rationale for the district court's decision.

V. *Proceedings on Remand*

Although we reject a qualified speech or debate privilege, our discussion does not preclude the possibility of a more narrowly tailored privilege for confidential deliberative communications. Notwithstanding their advocacy of a broad speech or debate privilege, the Legislators have relied in oral argument on confidentiality concerns. The district court apparently assumed that state legislative documents are privileged merely because they may somehow reveal the "thought processes" of state legislators. Although we are reluctant to go so far as to recognize a confidentiality privilege and to delineate its contours, we believe we must analyze the district court's assumption to provide guidance for remand. We note in this regard that this case has already been before us twice and that the Grand Jury's investigation has been delayed by more than a year.

To analyze the Legislators' confidentiality concerns, we look for guidance to the "deliberative process privilege" for executive officials. Of all confidentiality privileges for government officials, that privilege has probably received the most intricate explication by the courts. *See generally* M. Larkin, Federal Testimonial Privileges §5.02[2] & 5.07, at 5-13 to 5-30, 5-87 to 5-90 (1986); Project, *Developments in the Law Privileged Communications*, 98 Harv. L. Rev. 1450, 1592, 1620-23 (1985). We also believe that it provides a useful analogy for a confidentiality-based privilege for state legislators because executive agencies, like state legislators, engage in a wide variety of activities, including factual investigations for quasi-legislative rulemaking.[8]

The "deliberative process privilege" applies only to confidential deliberations of law or policymaking, reflecting opinions, recommendations or advice. *See NLRB v. Sears Roebuck & Co.*, 421 U.S. at 150-54; *EPA v. Mink*, 410 U.S. 73, 89 & n. 16 (1973). "[I]n most situations, factual summaries prepared for informational purposes" will not be protected even if they are part of an investigative record. *Paisley v. C.I.A.*, 712 F.2d 686, 699 (D.C. Cir. 1983) (citing cases). Even if documents contain advisory opinions, factual material which is severable is not protected. *See Mink*, 410 U.S. at 88-91. Furthermore, the party seeking disclosure may overcome the claim of privilege by showing a sufficient need for the material in the context of the facts or the nature of the case, *see Sears Roebuck & Co.*, 421 U.S. at 149 n. 16; *FTC v. Warner Communications, Inc.*, 742 F.2d 1156, 1161 (9th Cir. 1984); or by making a prima facie showing of misconduct, *see KPC Nat'l Management Corp. v. NLRB*, 497 F.2d 298, 305 (D.C. Cir. 1984), *cert. denied*, 423 U.S. 1087 (1976); *Singer Sewing Machine Co. v. NLRB*, 329 F.2d 200, 208 (4th Cir. 1964).

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8. In addition, subpoenas directed at executive agencies arouse less direct concerns about separation of powers than subpoenas directed either at Congress or at the President and therefore provide a more useful model for a privilege mediating federal/state relations.

These limitations reflect the careful tailoring of the privilege to achieve its purpose of protecting confidentiality without unduly inhibiting the truth-finding process of litigation. Without holding that a deliberative process privilege does protect state legislators, we therefore reject the district court's assumption that a privilege protects all state legislative documents which may somehow reveal the "thought processes" of state legislators. Confidentiality concerns do not sweep so broadly. If a deliberative process privilege does protect state legislators, it is limited to communications involving opinions, recommendations or advice about legislative decisions. In addition, severable, factual material cannot be privileged.

In this case, the U.S. Attorney has repeatedly disclaimed interest in confidential deliberations and has stated that he seeks only hard evidence. Most if not all of the documents sought in this case are notes, summaries and transcripts of interviews that are unlikely to contain deliberative communications. We therefore suspect that the district court will be able to resolve any dispute about confidential portions of subpoenaed material without depriving the Grand Jury of the materials it seeks merely by exempting or excising any confidential deliberations that the documents contain. If necessary, the court may order *in camera* inspection of disputed documents. *See Kerr v. United States District Court*, 426 U.S. 394, 406 (1976) ("*in camera* review is a highly appropriate and useful means of dealing with claims of governmental privilege").

V. *Conclusion*

For the foregoing reasons, the order of the district court limiting the subpoena will be reversed and the case remanded for proceedings consistent with this opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY SUBPOENA) Misc. No. 86-027

MEMORANDUM

This case presents what is apparently a question of first impression regarding the power of a federal grand jury to subpoena information from a duly constituted select committee of the state legislature. We are here called upon to decide whether members of the Pennsylvania House of Representatives who are not themselves the target of a federal criminal investigation may assert a privilege of non-disclosure, based on constitutional Speech or Debate considerations, against a federal grand jury subpoena.

The following facts are undisputed.[1] The House of Representatives of the General Assembly of the Commonwealth of Pennsylvania (the House), through its Select Committee to Investigate Compliance With the Steel Products Procurement Act (the Committee) has for approximately a year been investigating, *inter alia*, alleged improprieties concerning the procurement of granite for the expansion of the state capitol in Harrisburg, Pennsylvania. Transcript at 3. More specifically, the claimed wrongdoing has occurred in connection with sole source no-bid contracts, including supply and fabrication agreements. *Id*. That investigation is ongoing, *id*., and includes fact-finding in the nature of calling witnesses to appear before the Committee as well as conducting interviews through investigators hired by the Committee. *Id*. at 4.

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1. On January 17, 1986, this court heard oral argument on the instant Motion to Quash Subpoena, following which we stayed enforcement of the subpoena for a period of ten days, later extending the stay through January 31, 1986. At oral argument the parties entered into stipulations of fact, disputing only the legal issues. References herein to the transcript of that proceeding shall be designated as "Transcript".

At the invitation of the Pennsylvania Department of General Services,[2] the United States Attorney for the Middle District of Pennsylvania (hereinafter the United States Attorney or the United States) convened a grand jury to investigate the alleged improprieties. Affidavit of James J. West, Pars. 1 and 2. On January 15, 1986, the grand jury issued a subpoena directed to Nicholas Colafella, Representative of the 15th District, in his capacity as Chairperson of the Committee, or to the Records Custodian of the Committee, requesting the production of the following materials:

> 1. Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individual and companies named on the attached list.
>
> 2. Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts, summaries, agenda or minutes during the testimony or in comments by committee members or staff.

On January 17, 1986, Nicholas Colafella and several other persons[3] filed the instant Motion to Quash that subpoena,

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2. On January 10, 1986, Walter Baran, Secretary of the Department of General Services, wrote to the United States Attorneys for the Western and Middle Districts of Pennsylvania requesting that their offices and the Federal Bureau of Investigation "initiate an immediate criminal investigation in order to ascertain whether any conduct enegaged in by or between the . . . contractors or subcontractors (involved in the "purchasing, handling and finishing of the granite") are [sic] in violation of Federal or State Law". Letter attached to Affidavit of James J. West, United States Attorney, submitted in opposition to Motion to Quash ("*Schofield* Affidavit").

3. The other movants are K. Leroy Irvis, Speaker of the House; James J. Manderino, Majority Leader of the House; Mathew J. Ryan, Minority Leader of the House; and the Bi-Partisan Committee for the Administration of the House.

contending that its enforcement would contravene the doctrine of legislative immunity mandated by the Speech or Debate Clause.

This court has the power to quash or modify a subpoena duces tecum under Rule 17(c) of the Federal Rules of Criminal Procedure.[4] Courts have emphasized the importance of this power in view of the fact that "[a]lthough grand jury subpoenas are issued in the name of the district court, they are issued pro forma and in blank to anyone requesting them without prior court approval or control". *In re Grand Jury Matters*, 751 F.2d 13, 16 (1st Cir. 1984). Thus, because these subpoenas are "in fact almost universally instrumentalities of the United States Attorney's office or of some other investigative or prosecutorial department of the executive branch", *In re Grand Jury Proceedings (Schofield I)*, 486 F.2d 85, 90 (3d Cir. 1973), practical responsibility for preventing abuse of the subpoena power and for "controlling grand jury excesses" lies with this court. *In re Pantojas*, 628 F.2d 701, 705 (1st Cir. 1980); *In re Grand Jury Matters*, 751 F.2d at 16.

The Third Circuit has said that because "a presumption of regularity attaches to the grand jury's proceedings, and hence to a grand jury subpoena. . . . The party objecting to enforcement has the burden of making some showing of irregularity". *Schofield I*, 486 F.2d at 92. However, the United States must make a preliminary showing by affidavit, indicating that each item sought is "(1) relevant to an investigation, (2) properly within the grand jury's jurisdiction, and (3) not sought primarily for another purpose". *In re Grand Jury Proceedings*, ("*Schofield II*"), 507 F.2d 963, 966 (3d Cir. 1975), *cert. denied*, 421 U.S. 1015 (1975). The *Schofield* cases "soundly rejected any contention that the district court should 'rubber stamp' petitions for the enforcement of grand jury subpoenas". *Schofield II*, 507 F.2d at 964.

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4. Fed.R.Crim.P. 17(c) provides:

A subpoena may . . . command the person to whom it is directed to produce the books, papers, documents or other objects designated therein. The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or excessive.

The grand jury's investigative powers are "necessarily broad . . . [b]ecause its task is to inquire into the existence of possible criminal conduct and to return only well-founded indictments". *Branzburg v. Hayes*, 408 U.S. 665, 688 (1972).

> Hence, the grand jury's authority to subpoena witnesses is not only historic, but essential to its task. Although the powers of the grand jury are not unlimited and are subject to the supervision of a judge, the longstanding principle that 'the public . . . has a right to every man's evidence', except for those persons protected by a constitutional, common-law, or statutory privilege, is particularly applicable to grand jury proceedings.

Id. (Citations and footnote omitted.) Thus, the grand jury's right to "every man's evidence" is substantively limited only by express privileges, although under Federal Rule of Criminal Procedure 17(c) this court may also quash or modify a subpoena which appears to be unreasonable or oppressive in its demands. *In re Grand Jury Matters*, 751 F.2d at 17.

We proceed now to address the claim of privilege at issue in this case, which arises from the Speech or Debate clauses of the United States and Pennsylvania Constitutions. As a preliminary matter, although we note that the federal and state provisions are congruent,[5] we decline to decide this case under the Pennsylvania Constitution, despite movants' urging that we do so. See Movant's Responsive Brief (hereinafter cited as Movant's Brief) at 6-7. In *United States v. Craig*, 528 F.2d 773 (7th Cir. 1976) (*Craig I*), *cert. denied*, 425 U.S. 973 (1976), *concurrence adopted as opinion of en banc court*, 537 F.2d 957 (7th Cir. 1976) (*Craig II*), *cert. denied sub nom. Markert v. United States*, 429 U.S. 999 (1976), the court established that the State Constitution was inapplicable to a state legislator's claim of

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5. The United States Constitution, Art. I, §6, cl. 1, provides that "for any Speech or Debate in either House, [the Members of Congress] shall not be questioned in any other place". This language is virtually identical to the provision embodied in the Pennsylvania Constitution, Art. 2, §15 which states, in reference to the Members of the General Assembly, that "for any speech or debate in either House they shall not be questioned in any other place".

privilege in a federal criminal prosecution. This was so because the Federal Rules of Evidence and the Federal Rules of Criminal Procedure contemplated "that the admissibility of evidence in criminal cases in federal courts would be governed by Federal law and would not be dependent upon diverse state laws, including state constitutional provisions". *Craig I*, 528 F.2d at 776. *See also Lake Country Estates v. Tahoe Planning Agency*, 440 U.S. 391, 404 (1979) (recognition of immunity for state legislators reflected the court's interpretation of federal law; the decision "did not depend on the presence of a speech or debate clause in the constitution of any state"). Accordingly, we do not address the applicability of the Pennsylvania Constitution's Speech or Debate provision.

Furthermore, the Federal Constitution's Speech or Debate provision is not directly applicable to members of a state legislator. *Lake Country Estates*, 440 U.S. at 404. However, state legislators may in some circumstances invoke the protection of common law immunity under the federal clause. *Id.*; *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, 6 (2d Cir. 1980); *Craig I*, 528 F.2d at 782 ("The protection afforded state legislators from liability under federal law for acts done in their legislative roles . . . is not based upon the speech or debate clause of the Federal Constitution . . . a clause that applies only to Congress, but rather upon the common-law doctrine of official immunity").

Thus, the precise question before this court is whether movants are here entitled to invoke common-law immunity from the effects of the federal grand jury subpoena. Federal Rule of Evidence 501 provides in full that:

> Except as otherwise required by the Constituion of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, *the privilege of a witness, person, government, state, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience*. However, in civil actions and proceedings, with respect to an element of a claim or

> defense as to which state law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with State law.

F.R.E. 501 (emphasis supplied).

We turn now to an examination of the principles of the common law in the Speech or Debate clause area to determine whether, "in the light of reason and experience", those principles should apply to this case.

The Supreme Court has traced the history and purpose of the Speech or Debate provision thus:

> The privilege of legislators to be free from arrest or civil process for what they do or say in legislative proceedings has taproots in the Parliamentary struggles of the Sixteenth and Seventeenth Centuries. As Parliament achieved increasing independence from the Crown, its statement of the privilege grew stronger. . . . In 1689, the Bill of Rights declared in unequivocal language: 'That the Freedom of Speech, and Debates or Proceedings in Parliament, ought not to be impeached or questioned in any Court or place out of Parliament'.
>
> Freedom of speech and action in the legislature was taken as a matter of course by those who severed the Colonies from the Crown and founded our Nation. . . . The reason for the privilege is clear. It was well summarized by James Wilson, an influential member of the Committee of Detail which was responsible for the provision in the Federal Constitution. 'In order to enable and encourage a representative of the public to discharge his public trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offense' . . . . The provision in the United States Constitution was a reflection of political principles already firmly established in the States.

Tenney v. Brandhove, 341 U.S. 367, 372-73 (1951). *See also United States v. Helstoski*, 442 U.S. 477, 491-92 (1979); *United States v. Johnson*, 383 U.S. 169, 178 (1966).

In view of these important functions of the Clause, the cases establish that it is to be read broadly, "to include not only 'words spoken in debate', but anything 'generally done in a session of the House by one of its members in relation to the business before it' ". *Johnson*, 383 U.S. at 179 (citations omitted); *United States v. Meyers*, 432 F.Supp. 456, 458 (W.D. Pa. 1977). While "the heart of the Clause is speech or debate", it also includes other matters which are "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House". *Gravel v. United States*, 408 U.S. 606, 625 (1972). The Clause "protects against inquiry into acts that occur in the regular course of the legislative process and into the motivation for those acts", *United States v. Brewster*, 408 U.S. 501, 525 (1972), and legislative fact-finding is such a protected act. *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1974); *McSurely v. McClellan*, 553 F.2d 1277 (D.C. Cir. 1976). In short, "[r]ather than giving the Clause a cramped construction", the Supreme Court has "sought to implement its fundamental purpose of freeing the legislator from executive and judicial oversight that realistically threatens to control his conduct as a legislator". *Gravel*, 408 U.S. at 618.

Of particular relevance to the decision at bar are those instances in which the federal courts have accorded this immunity to state legislators. In *Star Distributors, Ltd. v. Marino*, 613 F.2d 4, the Second Circuit affirmed the denial of a preliminary injunction which had sought to restrain enforcement of a subpoena issued by a state legislative committee. In so holding, the court stated that

> under our system of federalism, the role of the state legislature is entitled to as much respect as that of Congress. Congress may legislate on matters of national concern, while state legislators act on vital matters of local importance. The need for a Congress which may act free of interference by the courts is neither more nor less than the need for unimpaired state legislatures.

613 F.2d at 9. Noting that "[t]he Supreme Court has stated in dictum that 'the state legislative privilege . . . [is] on a parity with the similar federal privilege' under the Speech or Debate Clause, *United States v. Johnson*, 388 U.S. 169," the *Star Distributors* court concluded that the "shared origins and justifications" of the federal Speech or Debate provision and the doctrine of common-law immunity of state legislators from suit rendered the two doctrines parallel, in the absence of "good reason" for a contrary conclusion. 613 F.2d at 8. Thus, because the Supreme Court had held that the federal Speech or Debate provision barred a suit for injunctive relief against enforcement of a subpoena issued by a Senate committee, *Eastland*, 421 U.S. 491, state legislators were to be accorded a similar immunity. *Id.*

A salient difference in the scope of the privilege accorded to state legislators and that provided to members of Congress appears to be that the common-law doctrine does not immunize state legislators from federal criminal prosecution in connection with their legislative acts. In *United States v. Gillock*, 445 U.S. 360 (1980), the Supreme Court expressly stated that it had granted certiorari "to resolve a conflict in the Circuits over whether the federal courts in a federal criminal prosecution should recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator" charged with crime. 445 U.S. at 361-62. Having so stated the issue, the court declined to recognize such a privilege, finding that neither of the "two interrelated rationales" which underlie the Speech or Debate clause would support the granting of immunity. First, the separation of powers doctrine did not mandate the privilege because, under the Supremacy Clause, Federal interference into state legislative process was "not on the same constitutional

footing with the interference of one branch of the Federal Government in the affairs of a coequal branch". 445 U.S. at 370. The second rationale, which was the need to insure legislative independence, similarly gave way to preeminent federal criminal statutes. *Id.* at 371-72.

As this court reads *Gillock*, its holding was expressly confined to those situations in which a state legislator is charged with a federal crime or is the target of a federal criminal investigation. The court distinguished its decision on this basis from those of its precedents which had accorded immunity to state legislators in civil cases. 445 U.S. at 372. Thus, *Gillock* stands only for the proposition that "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its *criminal statutes with only speculative benefit to the state legislative process*". *Id.* at 373 (emphasis added).[6] *See also United States v. Craig*, 528 F.2d 773, 783 (Tome, J., concurring) (principles of common-law immunity, cognizable under F.R.E. 501, protected a state legislator in a civil case but not in a criminal prosecution, because "immunity from civil but not criminal liability has been regarded as sufficient to achieve the purpose of the doctrine of official immunity, which is to promote independence and fearless discharge of duty on the part of the protected officials"). *But see United States v. Meyers*, 432 F.Supp. 456 (granting a state senator's motion to strike a

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6. Because we interpret *Gillock* in this manner, we must reject the United States' strenuous contention that that case is dispositive of the one before us. The United States Attorney contends that *Gillock* controls this case because the federal grand jury "has Constitutional and statutory authority to be investigating violation of federal criminal laws . . . and . . . since it has the power to act, it must prevail over the state legislatures' claims of a speech and debate privilege". Brief for United States at 7. We decline, however, to read *Gillock* so broadly. As we have noted, the Court therein expressly confined its holding to those cases in which the state legislator was the target of a criminal investigation. That situation implicated a much stronger federal interest than any that may be found in the case at bar, where the United States has stipulated that the Committee members are not themselves targets of the investigation. Transcript at 5-6. Accordingly, far from disposing of the present case, we find the *Gillock* holding to be inapposite.

portion of an indictment against him, because "the doctrine of legislative immunity is one of the fundamental principles of ordered Anglo-American liberty which is made binding on the States by virtue of the Fourteenth Amendment", and the "reasons and public purpose upholding" such immunity were "equally applicable to State and federal legislators").

Significantly, despite *Gillock's* admonition that no immunity is recognized for state legislators under criminal investigation, the Third Circuit has recently extended such protection to a Virgin Islands legislator. In *Government of the Virgin Islands v. Lee*, 775 F.2d 514 (3rd Cir. 1985), the court held that the Virgin Island's legislative immunity provision, contained in a statute found at 48 U.S.C. §1572(d), was "closely parallel" to the Speech or Debate Clause in terms of the purposes underlying the two provisions. Therefore, the territorial legislator was by statute accorded immunity from inquiry in federal court regarding his fact-finding and legislative activities, although the privilege did not bar inquiry into whether his activities were in fact legislative in nature. In so holding, the court reaffirmed that

> Fact-finding, information gathering, and investigative activities are essential prerequisites to the drafting of bills and the enlightened debate over proposed legislation. As such, fact-finding occupies a position of sufficient importance in the legislative process to justify the protection afforded by legislative immunity. Legislators must feel uninhibited in their pursuit of information, for '[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change. . .' *McGrain v. Daugherty*, 273 U.S. 135, 175 (1972).

Lee, 775 F.2d at 521-22. Although the result in *Lee* was based on the existence of a specific federal statute which afforded immunity to Virgin Islands legislators, the court's stress on the importance of immunity to the legislative fact-finding process is instructive, and its reasoning is directly apposite to our own inquiry.

Finally, we find a useful analogy in a line of cases in which state revenue officials have been accorded a qualified common-law privilege from disclosure of information sought by a federal grand jury investigating non-tax crime. In *In re Hampers*, 651 F.2d 19 (1st Cir. 1981), the court held that the Massachusetts Commissioner of Revenue would not be required to comply with a federal grand jury subpoena because a state statute prohibited disclosure of tax return information except under specified circumstances. Rejecting, *inter alia*, the argument that deference was owed to the grand jury or that disclosure was mandated by virtue of its 'mantle of confidentiality', the court held that the nondisclosure statute created a privilege cognizable under F.R.E. 501 in a federal proceeding.

The *Hampers* court relied heavily on *American Civil Liberties Union of Mississippi v. Finch*, 638 F.2d 1336 (5th Cir. 1981), which mandated a balancing of the policies underlying the privilege against the policies favoring disclosure. *Finch*, 638 F.2d as 1343. Engaging in such a balancing process, the court noted that

> honoring such a privilege in federal court will usually involve some cost to the federal interest in seeking the truth in Federal question cases. It makes a difference whether the federal interest in seeking full disclosure is a weak or a strong one. . . . Assisting federal grand juries in their criminal investigations is generally a strong interest. But where the information sought is only corroborative of what investigators have alleged on the basis of other information, is seemingly ascertainable from sources other than state tax returns, and addresses only one aspect of a non-tax related crime, the federal interest looms less.

Id., 651 F.2d at 22.

The court balanced the interests involved by asking, *inter alia*, whether "the *injury* that would inure to the relation by the disclosure of the communications [would be] *greater than the benefit* thereby gained for the correct disposal of litigation". *Id.* at 23 (emphasis in original). Concluding that the state's asserted privilege was "intrinsically meritorious in our independent

judgment", the court determined that the balance tipped in favor of the state's interest in non-disclosure:

> We can easily see that if a state tax return contained the only key to resolving a serious federal crime, the balance would tilt in favor of the federal government. . . . But if a return contained information that would be easily obtained elsewhere and at best would constitute only cumulative evidence impeaching one of several witnesses, we might have second or third thoughts.

Id.

Alluding to the "value in preserving . . . the postures of comity and deference arising from federalism", the court concluded thus:

> We therefore hold that appellant in this case enjoys a qualified privilege under Rule 501 because of the state nondisclosure statute and that, in order to enforce a subpoena in a federal criminal investigation, a federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought will be probative of a matter at issue in the prosecution of that crime, and that the same information or equally probative information can not be obtained elsewhere through reasonable efforts.

Id.[7] *See also In re Cruz*, 561 F.Supp. 1042 (D. Conn. 1983); *In*

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7. The United States Attorney contends that *Hampers* is inapposite to this case for several reasons. While he concedes that *Hampers* and its progeny "based their holding on the finding of a qualified common-law privilege under Rule 501", Brief for United States at 16, he nevertheless perseveres in his claim that, under *Gillock*, no such common-law privilege exists in the speech or debate area. However, we have already rejected this argument, *supra* n. 6; as in our view *Gillock* does not control this case.

Secondly, the United States would distinguish the *Hampers* line of cases because they deal with "tax matters where both State and federal policy requir[e] confidentiality and the public in general ha[s] a legitimate expectation that their state and federal tax records would remain confidential". Brief for United States at 16. We do not find this distinction persuasive because the policy of legislative integrity underlying the Speech or Debate Clause is no less

(Footnote Continued)

re Grand Jury Empanelled January 21, 1981, 535 F.Supp. 537 (D. N.J. 1982) (citing *Hampers* and reaching similar result); *but see United States v. Blasi*, 462 F.Supp. 373 (M.D. Ala. 1979) (state non-disclosure statute deemed not to have any direct bearing on controversy regarding grand jury subpoena).

This court is persuaded that a similar common-law privilege should be recognized in the circumstances of this case. On the whole, we find that the policy underlying the asserted privilege outweighs that favoring disclosure. The legislative fact-finding in which the Committee is engaged falls squarely within the ambit of speech or debate protection, and therefore implicates fully the values of legislative independence which underlie the

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(Footnote Continued)

important than the requirement of confidentiality in tax matters.

In a related vein, the United States points out that *Hampers* involves the 'required report' privilege recognized "when a state law requires citizens to do something under a promise of confidentiality". Brief for United States at 16. The United States contends that the Third Circuit expressly rejected the required report privilege under Rule 501 in *Matter of Grand Jury Impaneled January 21, 1975 ("Freedman and Cortese")*, 541 F.2d 373 (3d Cir. 1976).

We disagree, however, with the United States Attorney's reading of *Freedman and Cortese*. Although the Third Circuit there held that a federal grand jury subpoena was enforceable against the Prothonotary's Office of the Court of Common Pleas of Philadelphia, despite a confidentiality rule adopted by that court, it reached this conclusion by virtue of a balancing process very similar to that established in *Hampers*:

> The state's interest in voluntary compliance (with the filing requirement) will not be seriously impaired by enforcing the instant grand jury subpoena. . . . On balance, we think that any incidental and speculative effect enforcement of the subpoena would have on voluntary compliance is outweighed by the grand jury's need for this evidence in order effectively to conduct this investigation.

541 F.2d at 382-83. Furthermore, the court expressly left open the possibility of a different outcome of this balancing:

> We . . . have not decided that a federal court will never recognize a state required report privilege as a matter of federal common law in a federal grand jury investigation. Perhaps there may be instances that will present compelling justifications for denying a federal grand jury relevant information; such justifications were not presented here.

Id. at 383. Thus, *Freedman and Cortese* supports the proposition that a grand jury subpoena may be quashed or modified if the state body to which the subpoena is directed presents sufficiently compelling reasons for this result.

privilege. Furthermore, because none of the Committee members is a target of the investigation, to recognize the privilege will not directly thwart the federal interest in criminal prosecution. Accordingly, we find that the privilege asserted by the Committee is "intrinsically meritorious in our independent judgment". *Hampers*, 651 F.2d at 22.[8]

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8. Moreover, we reject the United States' contention that this immunity is merely a use privilege and does not shield legislative action from discovery by the grand jury. In support of this argument the United States Attorney relies on *In re Grand Jury Investigation ("Eilberg")*, 587 F.2d 589 (3d Cir. 1978) which in turn cited *Gravel v. United States*, 408 U.S. 606. We think the United States' reliance on these cases is misplaced.

In *Eilberg*, the Third Circuit affirmed the district court's refusal to quash a federal grand jury subpoena which sought to obtain the telephone records of a Member of Congress who was himself a target of the investigation. The court stated that "the Speech or Debate Privilege is at its core a use privilege", 587 F.2d at 596, but continued that "[t]o be sure, the Speech or Debate Clause has also been construed to permit a legislator to refrain from *testifying* about certain legislative acts". *Id.* To that effect, the court cited the Supreme Court's statement in *Gravel* that "Senator Gravel may not be made to answer — either *in terms of questions* or in terms of defending himself from prosecution — for the events that occurred at the subcommittee meeting". *Id.* at 596, citing *Gravel*, 408 U.S. at 616 (emphasis supplied in *Eilberg*). The Third Circuit noted that *Gravel*, had established that "a Senator, even a non-target, could not be compelled to testify before a grand jury about a legislative act", *id.*, and that this privilege extended to legislative aides. It continued

> But to the extent that the Speech or Debate Clause creates a *testimonial* privilege as well as a *use* immunity, it does so only for the purpose of protecting the legislator and those intimately associated with him in the legislative process from the harassment of hostile questioning. It is not designed to encourage confidences by maintaining secrecy, for the legislative process in a democracy has only a limited toleration for secrecy. . . . As we have said . . . the privilege when applied to records or third-party testimony is one of non-evidentiary use, not of non-disclosure.

Id. at 597 (citations omitted) (emphasis in original).

In this court's view, *Eilberg* is inapplicable to the present case because here the subpoena is directed to the legislator himself, rather than to a third party. Therefore, testimonial rather than use immunity applies. As we understand the Committee's argument, it is not attempting to assert the privilege on behalf of others, but rather is claiming that immunity is necessary to protect *its own legislative process*. Accordingly, the United States' argument

(*Footnote Continued*)

More specifically, we conclude on the basis of the record before us that the injury that would inure to the integrity of the state legislative process by our enforcement of this subpoena outweighs the benefit to be gained by the federal prosecutorial authorities.

The United States Attorney has stated that

> it is the intent of the subpoena to require the production of documents in the form of memorandums, reports, summaries, interview notes and record review notes dealing with an investigation into the purchase of granite for use in the capitol addition project. Particularly statements dealing with interviews conducted of a list of witnesses that are attached to that subpoena or statements developed by the investigators or attorneys acting as investigators hired by the committee and, again, dealing only with the investigation insofar as it relates to the purchase of granite for use in the capitol project.
>
> The second paragraph of the subpoena is aimed at transcripts of both public and private hearings that the committee has conducted along with copies of all documents or exhibits referred to in said transcripts of either the public or private hearings. That is the heart of the subpoena.

Transcript at 5. Such materials, we think, would convey the impressions and thought processes of the Committee members, and are thus central to the legislative fact-finding process. While the Committee may divulge this information voluntarily if it chooses to do so, and the United States concedes that it has, Transcript at 7-8, this court declines to require such disclosure by enforcing the subpoena. To compel the Committee to divulge this information would represent an impermissible intrusion

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(Footnote Continued)

that the Committee is attempting to "benefit third parties" who are committing crimes by "transfer[ing] legislative privilege" to them, Brief for United States at 15, n. 1, entirely misconstrues the thrust of the Committee's claim. To reiterate: the Committee seeks to protect itself, not the targets of its investigation.

into the legislative process and would render the status of the Committee little more than an investigative tool of the grand jury. In this regard, we note that

> It is the responsibility of the court to preserve the grand jury's historic role as a bulwark between the individual and the state. Hence, the federal courts have broad supervisory power to prevent grand jury abuse, including the granting of relief from unreasonable and oppressive grand jury process. . . .when federal district judges are confronted with appropriate motions to quash, limit or enforce grand jury subpoenas, they can and indeed should, exercise their responsibility to prevent grand jury abuse by insisting that the government invoke the subpoena power only when there is solid foundation for doing so.

In re Grand Jury Matter, Gronowicz, 764 F.2d 983, 991 (3d Cir. 1985) (Becker, J., concurring) (citations omitted).

We are aware that our decision may prove detrimental to the grand jury's investigation. Although the United States has conceded that the Federal Bureau of Investigation "certainly . . . could conduct an investigation" of its own "in an attempt to develop what the Committee has developed and then could present it to the grand jury", Transcript at 8, it is also probably true that

> there can yet be no guarantee that a complex investigation involving multiple witnesses and numerous exhibits can be totally duplicated even by the best of investigative agencies, and the possibility is obvious that critical inculpatory evidence or exculpatory evidence obtained in interview reports, closed hearing testimony, or multiple exhibits

may be lost if the subpoena is not enforced. Brief for United States at 19. However, our balancing of this potential detriment against the clear and impermissible intrusion into the legislative sphere which the subpoena represents compels our conclusion

that, with respect to most of the information sought, enforcement must be denied.[9]

We will except from our holding certain information the procurement of which, we find, would not intrude unduly into the legislative process. The grand jury may obtain from the Committee information regarding the identity of witnesses interviewed. Furthermore, should the grand jury become aware, in the course of its own investigation, of documents or exhibits authored by a witness or by a third party other than the members of the Committee, which documents or exhibits are determined to be in the Committee's possession and which cannot be obtained by any other means, then the subpoena power may be employed. With respect to all other matters, the Motion to Quash the subpoena will be granted.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: January 31, 1986

9. This conclusion is buttressed by the contentions of the Committee that much of the information sought is readily available from other sources. Although those sources are accessible to the FBI, they have apparently not been fully exploited. Affidavit of Reizdan Moore, Counsel to the Committee, annexed as Exhibit D to Movant's Brief, Par. 3. Furthermore the Committee has cooperated to a considerable extent with the federal investigation and has voluntarily provided substantial information, including the names of witnesses and the impressions of Committee Members regarding the investigation. *Id.* at Pars. 4, 5. Finally, the counsel for the Committee states that "all relevant and pertinent committee documents, which have not been made public, will be made public by February 6". *Id.* at 10. Thus this court cannot see any pressing read for the enforcement of this subpoena.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY SUBPOENA) Misc. No. 86-027

ORDER

In accordance with the accompanying memorandum, IT IS HEREBY ORDERED THAT the Motion to Quash Subpoena is granted, EXCEPT with respect to the following materials:

1. The identities of all witnesses;

2. Any exhibits or documents of which the grand jury may become aware, in the course of its investigation, authored by witnesses or by third parties other than the Committee or its members, which are in the possession of the Committee and which cannot be obtained from any other source.

With respect to this information, the subpoena, as modified, shall be enforced.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: January 31, 1986

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5144

IN RE: GRAND JURY IN THE MATTER OF: GRANITE PURCHASES FOR STATE CAPITOL — GRAND JURY SUBPOENA NUMBER 86-1
UNITED STATES OF AMERICA,
Appellant

On Appeal from the United States District Court
for the Middle District of Pennsylvania
(D.C. Misc. No. 86-027)

Argued August 19, 1986

Before: BECKER and MANSMANN, *Circuit Judges*
and TEITELBAUM, *District Judge**

ORDER

The United States has appealed from an order of the United States District Court for the Middle District of Pennsylvania, granting partial relief on a motion to quash a Federal Grand Jury subpoena. The subpoena, served upon the chairman of a Pennsylvania legislative committee, seeks records of the Committee's investigation into bribery and alleged political corruption in connection with certain state construction contracts. The United States contends that the district court, in modifying the subpoena, erred in fashioning a balancing test predicated on a

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* The Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation.

federal common law speech or debate privilege under Rule 501 of the Federal Rules of Evidence.

The subpoena called for all records in the hands of the Committee "*relating to* an investigation of the purchase of granite used in the Capital addition project as follows . . . ." (Emphasis supplied.) Following this language, the subpoena specified many kinds of documents and a specific list of individuals with whose testimony the grand jury is concerned. The subpoena also stated that compliance could be by mail. In explaining the subpoena at the initial hearing on the legislature's motion to quash the subpoena, the U.S. Attorney stated that, if the Committee would represent that there were no "vital and relevant" documents requested in the subpoena that had not been made public, he would "withdraw [his] subpoena and abide the event." (Appendix at 51.) The U.S. Attorney also stated that he had no interest in legislative thought or work processes or material protected by attorney-client privilege. (Appendix at 57.) Thereafter, the court stayed enforcement of the subpoena and permitted the parties to file briefs. On January 31, 1986, the district court issued its memorandum decision and order modifying the subpoena, and the government's appeal followed.

On May 22, 1986, Reizden Moore, counsel to the Committee, represented in sworn affidavit that "all relevant or remotely relevant information regarding payoffs which was obtained on or before February 6, 1986, has been released to the public and turned over to the United States Government as promised at the hearing before Judge Rambo." (*See* Appellee's Br. at 48.) At oral argument before this Court, on August 19, 1986, the Assistant U.S. Attorney conceded that he had "no reason to believe that the Committee has not turned over everything within the ambit of the subpoena as narrowed by the government at the evidentiary hearing." However, he also stated that the Grand Jury remained concerned that the Committee's notion of relevant documents might differ from the Grand Jury's, so the government sought the right to work out some process by which it could verify that the two notions of relevancy were the same.

Counsel for the Committee rejoined by stating that the Committee had turned over all the evidence the U.S. Attorney had said he wanted in arguments before the district court, but he refused to accede to the government's demand for "verification." The panel, after hearing oral argument on the question of mootness and on the merits, suggested to counsel that they attempt to resolve their apparently minor differences and report to the Court in writing.

The parties' responses, which are attached as an appendix to this Order, reflect that differences remain. Essentially the Grand Jury acknowledges that it may have received virtually all the information it desires, but it expresses the view that some "reports and summaries of witness interviews containing factual information relative to the Granite kickback probe" may not have been released, in particular Committee investigator notes or summaries of witness interviews. The Grand Jury notes that such summaries may have value even if their substantive information has been released in another form and states that it requested all documents relating to the investigation regardless of their form. The U.S. Attorney also states, however, that any materials not produced "would probably not be of great significance to the government's investigation at this juncture." Furthermore, apart from declaratory relief for future controversies of this kind, the U.S. Attorney does not specify what exactly he expects to happen if we reinstate the subpoena, in the light of the Committee's claim to have complied. In response, counsel for the Committee refuses to enter into the stipulation sought by the U.S. Attorney. He states that the Committee has provided all the information requested by the U.S. Attorney's "amended demand" and claims that the U.S. Attorney now seeks documents of the Committee staff's "impressions and conclusions" which he had previously forsworn.

In the face of these bewildering statements, the panel cannot determine what the subpoena, as amended, now requests and whether a reinstatement of the subpoena would entitle the U.S. Attorney to receive relief he does not now have. Accordingly, the panel feels itself incapable of determining whether a live case or controversy remains to be decided;

furthermore, it lacks the facilities for resolving this question. If the case must be decided on the merits, it presents difficult and sophisticated questions on the frontier of privilege law. It is therefore ORDERED that this case be and it is hereby remanded to the district court for the purpose of making a determination as to mootness. This Court will retain jurisdiction meanwhile.

BY THE COURT:

/s/ Edward R. Becker
Circuit Judge

ATTEST:

/s/ Sally Mrvos
Clerk

DATED: September 25, 1986

Certified as a true copy and issued in lieu of a formal mandate on October 17, 1986.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk, United States Court of Appeals, for the Third Circuit.

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

IN RE: GRAND JURY SUBPOENA NO. 86-1	:	MISC. NO. 86-027
IN THE MATTER OF GRANITE PURCHASES FOR STATE CAPITOL	:	

THE BACKGROUND OF THIS ORDER IS AS FOLLOWS:

The House of Representatives of the General Assembly of the Commonwealth of Pennsylvania (the House), through its Select Committee to Investigate Compliance with the Steel Products Procurement Act (the Committee) has for a few years been investigating, *inter alia*, alleged improprieties concerning the procurement of granite for the expansion of the state capitol in Harrisburg, Pennsylvania. More specifically, the claimed wrongdoing has occurred in connection with sole source no-bid contracts, including supply and fabrication agreements. That investigation is ongoing and includes fact-finding in the nature of calling witnesses to appear before the Committee as well as conducting interviews through investigators hired by the Committee.

At the invitation of the Pennsylvania Department of General Services, the United States Attorney for the Middle District of Pennsylvania (hereinafter the United States Attorney or United States) convened a grand jury to investigate the alleged improprieties. On January 15, 1986, the grand jury issued a subpoena directed to Nicholas Colafella, Representative of the 15th District, in his capacity as Chairperson of the Committee, or to the Records Custodian of the Committee, requesting the production of the following materials:

> 1) Memos, reports, summaries, interview notes, record review notes, correspondence and any other documents of

an investigative nature compiled, adopted, prepared or sent and received by any committee investigator including, but not limited to, the listed individual and companies named on the attached list.

2) Agenda, minutes, summaries and all transcripts of public and private hearings, along with copies of all documents or exhibits referred to in said transcripts, summaries, agenda or minutes during the testimony or in comments by committee members or staff.

On January 17, 1986, Nicholas Colafella and several other persons filed a Motion to Quash that subpoena, contending that its enforcement would contravene the doctrine of legislative immunity mandated by the Speech or Debate Clause.

By Memorandum and Order dated January 31, 1986, this court granted the Motion to Quash with two exceptions. The United States appealed that Order. During the course of the oral argument conflicting representations were made to the panel as to whether the material produced voluntarily by the legislative committee represents all the evidence sought by the subpoena, or whether a reinstatement of the subpoena would entitle the United States Attorney to receive relief he does not now have.

The Court of Appeals remanded the case to this court for the purpose of making a determination as to mootness. Upon review of the Affidavit of Reizdan Moore, the Supplemental Affidavit of the United States, the United States' Brief on Remand and its attached exhibits, this court finds that a case or controversy still exists.

The specific items the United States seeks which have not been voluntarily turned over by the legislative committee, and which fall within the scope of the subpoena, are as follows:[1]

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1. The subject matter of all document requests pertain to the entire investigation of the Select Committee's investigation of compliance with the Steel Products Procurement Act. The request excludes intra-committee communications separate and apart from factual descriptions of an interviewee's statement.

1) memorandums, summaries of interviews, interview notes, reports of interviews with Carl Lunderstadt, John Scott, Robert Billingsly, Mr. Bernardo.

2) memorandums, summaries, notes, reports of interviews of potential witnesses interviewed by the committee's investigator, Stanley Gochenour and the committee's attorney, Reizdan Moore.

Consistent with the Memorandum and Order of this court dated January 31, 1986, the above items are subject matter covered by the Motion to Quash and do not fall within the enumerated exceptions.

/s/ Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: December 12, 1986

APPENDIX F

Supreme Court of the United States

No. A-155

NICHOLAS COLAFELLA, K. LEROY IRVIS, ET AL.,
Applicants,

v.

UNITED STATES

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for the applicants,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including October 4, 1987.

/s/ William J. Brennan, Jr.
Associate Justice of the Supreme Court of the United States

Dated this 24th day of August, 1987.

APPENDIX G

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 86-5144

IN RE: GRAND JURY

IN THE MATTER OF:
GRANITE PURCHASES FOR
STATE CAPITAL — GRAND JURY
SUBPOENA NUMBER 86-1

United States of America,
Appellant

(D.C. Misc. No. 86-027)

SUR PETITION FOR PANEL REHEARING AND REHEARING IN BANC

PRESENT: GIBBONS, *Chief Judge*, SEITZ, WEIS, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON and MANSMANN, *Circuit Judges* and TEITELBAUM, *District Judge**

The petition for rehearing filed by appellees in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active

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* The Honorable Hubert I. Teitelbaum, United States District Judge for the Western District of Pennsylvania, sitting by designation, as to panel rehearing only.

service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

/s/ Edward R. Becker
Circuit Judge

DATED: July 6, 1987

Supreme Court, U.S.
FILED
DEC 18 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-570

In the Supreme Court of the United States

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Solicitor General
WILLIAM F. WELD
Assistant Attorney General
JOSEPH C. WYDERKO
Attorney

Department of Justice
Washington, D.C. 20530
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QUESTION PRESENTED

Whether State legislative committee records are immune from subpoena by a federal grand jury.

BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-570

NICHOLAS COLAFELLA, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 821 F.2d 946. The opinion of the district court (Pet. App. 24a-41a) is reported at 626 F. Supp. 1319.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 1987. A petition for rehearing was denied on July 6, 1987. On August 24, 1987, Justice Brennan extended the time for filing a petition for a writ of certiorari to October 4, 1987, and the petition was filed on October 2, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The chairman of a select committee of the Pennsylvania General Assembly refused to comply with a federal grand jury subpoena seeking certain records of the committee's investigation into alleged contract fraud. Relying on a

common law privilege for state legislators derived from the Speech or Debate Clause of the Federal Constitution, the district court granted petitioners' motion to quash the subpoena in all but a few particulars. The court of appeals reversed the district court's order and remanded the case for consideration of whether the documents subject to the subpoena contain confidential communications protected by a deliberative process privilege.

1. In 1985, a select committee of the House of Representatives of the General Assembly of the Commonwealth of Pennsylvania began an investigation into the procurement of granite for constructing additions to the state capitol complex. The committee reviewed numerous documents and interrogated witnesses in both open and closed sessions. The committee's investigators prepared transcripts, summaries, notes, and memoranda of interviews during the course of the investigation in attempting to determine whether improprieties, including alleged payoffs, had occurred. In 1986, the United States Attorney for the Middle District of Pennsylvania convened a grand jury to investigate the allegation of contract fraud. The committee's chairman and counsel met with FBI agents and discussed their investigation, but they denied the agents access to material the committee had not made public, and they refused to reveal the names of many of the witnesses or to describe their testimony. Pet. App. 3a-4a.

Following that meeting, the United States Attorney caused a grand jury subpoena duces tecum to be directed to the committee's chairman or records custodian demanding production of the documents received and compiled in the course of the committee's investigation. The chairman moved to quash the subpoena and, with the consent of the United States Attorney, several other state legislators were permitted to intervene. The parties stipulated that no state legislator was a target of the grand jury investigation. Pet. App. 4a-5a.

The district court granted the motion to quash (Pet. App. 24a-41a). It found the Speech or Debate Clause of the State Constitution[1] inapplicable because the admissibility of evidence in federal criminal cases is governed by federal, rather than state, law (*id.* at 27a-28a). The court concluded, however, that a common law legislative privilege, derived from the Speech or Debate Clause of the Federal Constitution[2] and cognizable under Fed. R. Evid. 501,[3] generally protected the committee's records from disclosure to a federal grand jury. While quashing the grand jury subpoena for the most part, the district court nonetheless permitted the grand jury to obtain from the committee the names of the witnesses who appeared before the committee and indicated that the subpoena could be used to obtain copies of any document or exhibit written by a witness who was not a member of the legislature if the committee had the only copy (*id.* at 40a).

2. The court of appeals reversed (Pet. App. 1a-23a). It found instructive this Court's decision in *United States* v. *Gillock*, 445 U.S. 360 (1980), where the Court held that no common law privilege barred the introduction into evidence in a criminal proceeding of legislative acts of a State senator (*id.* at 374), even though the federal Speech or Debate Clause would have barred the introduction into

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[1] The Pennsylvania Constitution, Art. 2, § 15, provides that "for any speech or debate in either House [Members of the General Assembly] shall not be questioned in any other place."

[2] The Federal Constitution, Art. I, § 6, Cl. 1, provides that "for any Speech or Debate in either House, [Senators and Representatives] shall not be questioned in any other place."

[3] Rule 501 provides, in pertinent part, that "the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience."

evidence of the legislative acts of a Member of Congress (*id.* at 366-367). The court of appeals observed that in *Gillock* this Court analyzed the purpose of the speech or debate privilege in terms of " '[t]wo interrelated rationales . . .: first, the need to avoid intrusion by the Executive or Judiciary into the affairs of a coequal branch, and second, the desire to protect legislative independence' " (Pet. App. 13a (quoting 445 U.S. at 369)). Concerning the primary purpose, the court of appeals emphasized that it rests on a concern for the maintenance of separation of powers among the branches of the federal government, and that federalism principles do not raise the same concerns "because the Supremacy Clause sanctions 'interference' with state legislatures by the federal executive and judiciary so long as they pursue legitimate federal aims" (Pet. App. 17a). The court noted that, as a practical matter, state legislators could not be insulated from federal intrusion through the recognition of a qualified privilege, because that privilege would necessarily give way under *Gillock* whenever misconduct by a state legislator is alleged (*ibid.*).[4]

Concerning the second purpose of the Speech or Debate Clause, the court of appeals rejected petitioners' claims that a qualified privilege for state legislators must be recognized because the functioning of state legislatures

[4] The district court had distinguished *Gillock* by stating that "its holding was expressly confined to those situations in which a state legislator is charged with a federal crime or is the target of a federal criminal investigation" (Pet. App. 32a). The court of appeals stated: "[W]e do not believe the district court's efforts merely to distinguish *Gillock* paid proper respect to its significance. *Gillock*'s reasoning undercuts the weight we may accord interests of comity and federalism, and *Gillock*'s practical impact undermines the extent to which recognition of a speech or debate privilege for state legislators may realistically further the interests that the privilege has traditionally safeguarded" (*id.* at 16a).

could be impeded by onerous production requirements. The court agreed that an unduly burdensome subpoena could intrude on important state legislative interests, but it concluded that that concern was insufficient to justify the creation of a privilege because Fed. R. Crim. P. 17 authorizes the district courts to quash or modify a subpoena that is unreasonable or oppressive (Pet. App. 18a-19a). While finding state legislature's need for confidentiality "more troublesome" (*id.* at 19a), the court concluded that that need did not justify the creation of a privilege for the full range of activities normally protected by the federal Speech or Debate Clause. Instead, the court suggested, without deciding, that confidential communications could be protected adequately by a narrower privilege based on the widely recognized deliberative process privilege rather than the Speech or Debate Clause (*id.* at 22a). Accordingly, the court of appeals remanded the case to the district court for a determination of whether documents subject to the grand jury subpoena were protected by that narrower privilege (*id.* at 23a).

ARGUMENT

1. The court of appeals did not resolve the dispute in this case. Rather, it rejected the rationale employed by the district court, but then remanded the case for further proceedings to determine whether any or all of the subpoenaed materials are protected from disclosure under a privilege for confidential deliberative communications. Pet. App. 21a-23a. It is therefore unclear what materials, if any, petitioners will ultimately have to produce in response to the grand jury subpoena. More generally, the scope accorded to the deliberative communications privilege may well affect the character of the interests at stake in this and other speech or debate privilege cases. If a deliberative communications privilege is recognized, it may be held to cover the materials that petitioners regard

as most sensitive in this case, and that legislative committees in any future cases are likely to regard as needing special protection. Accordingly, this case is now in an interlocutory posture. The court of appeal's ruling at this juncture constitutes only an abstract treatment of legal principles. Until the district court applies those principles to the materials at issue in this case and rules that some or all of the subpoenaed materials must be produced, the case is not ripe for this Court's review.

2. Contrary to petitioners' contention (Pet. 6-11, 14-17), the court of appeals correctly concluded that state legislators are not entitled to assert a privilege based on the privilege enjoyed by Members of Congress under the federal Speech or Debate Clause.[5] In *Gillock* this Court concluded that the "separation of powers doctrine * * * [gives no support to the grant of a] privilege to state legislators in federal criminal prosecutions" and that "federal interference in the state legislative process is not on the same constitutional footing with the interference of one branch of the Federal Government in the affairs of a coequal branch" (445 U.S. at 370). While indicating that "principles of comity command careful consideration," the Court went on to find that "where important federal interests are at stake, as in the enforcement of federal criminal statutes, comity yields" (eid. at 373).[6] Accord-

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[5] It is not even clear, contrary to petitioners' apparent assumption, that Members of Congress could invoke the Speech or Debate Clause to resist complying with the subpoena in this case, as the court of appeals noted (Pet. App. 12a n.4). As the court also concluded, however, it is not necessary to reach that issue here.

[6] This Court has found state legislators immune from civil liability in a number of cases. See, *e.g.*, *Supreme Court* v. *Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980) (immunity for state judges acting in legislative capacity from declatory and injunctive relief in civil action); *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391 (1979) (immunity for regional legislator from damages in civil action); *Tenney* v. *Brandhove*,

ingly, since federal grand juries have a right to every man's evidence (*United States* v. *Dionisio*, 410 U.S. 1, 9-10 (1973)), and, under *Gillock*, federalism concerns are outweighed by the interest in enforcing federal criminal laws, there is no basis for a broad privilege such as that recognized by the district court.[7] In addition, the court of appeals correctly concluded (Pet. App. 17a) that recognition of a privilege barring disclosure of information relevant to federal criminal investigations would not in any event protect state legislatures from federal interference since, under *Gillock*, such a privilege would yield whenever federal investigators sought evidence of possible criminal activity by legislators.

Nor is there merit to petitioners' contentions, echoed by amici, that the decision below may "discourage legislatures from forming investigative committees, discourage

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341 U.S. 367 (1951) (immunity for state legislator from damages in civil action). However, this Court made clear in *Gillock* that the immunity recognized in those cases applies only in civil actions, stating that "*Tenney* was a civil action brought by a private plaintiff to vindicate private rights" and that "*Tenney* and subsequent cases on official immunity have drawn the line at civil actions" (445 U.S. at 372, 373). Similarly, in *Supreme Court* v. *Consumers Union of the United States, Inc.*, the Court distinguished *Gillock* by noting that "the separation-of-powers doctrine justifies a broader privilege for Congressmen than for state legislators in criminal actions" (446 U.S. at 733).

[7] Petitioners miss the mark in suggesting (Pet. 16 n.7) that it is relevant that proceedings involving failures to comply with grand jury subpoenas are civil in nature. What is relevant is not the nature of the proceeding but the nature of the federal interest, and here, as in *Gillock*, the federal interest is the enforcement of federal criminal law. Cf. *Gravel* v. *United States*, 408 U.S. 606, 627 (1972) (emphasis added) ("[W]e cannot carry a judicially fashioned privilege so far as to immunize criminal conduct proscribed by an Act of Congress *or to frustrate the grand jury's inquiry* * * *."), cited in *Gillock*, 445 U.S. at 373-374 n.12.

legislators from serving on these committees, and even discourage persons from serving as legislators if they may be summoned to appear before the grand jury at the whim of the United States Attorney" (Pet. 10). This contention exaggerates the potential burden of grand jury subpoenas on state legislative committees. All the grand jury seeks in this case is information that the committee has compiled that is relevant to a federal criminal investigation. There is no claim that the request here is burdensome, and there has been no request for testimony before the grand jury by any legislator. Moreover, as the court of appeals stated (Pet. App. 18a-19a), a district court may quash or modify a burdensome request under Rule 17, Fed. R. Crim. P. Furthermore, since the court of appeals suggested that the deliberative process privilege might protect confidential communications (Pet. App. 19a-23a), it is hard to see how its decision is likely to interfere significantly with the work of state legislatures.

3. There is no merit to petitioners' claim (Pet. 12-14) that the decision below conflicts with *Star Distributors, Ltd.* v. *Marino,* 613 F.2d 4 (2d Cir. 1980), and *In re Hampers,* 651 F.2d 19 (1st Cir. 1981). *Star Distributors* was a private civil action for injunctive relief against a State legislative committee. Applying this Court's decision in *Tenney* v. *Brandhove,* 341 U.S. 367 (1951), the court of appeals held that the private civil suit was barred by legislative immunity, even though it sought injunctive relief rather than damages. *Star Distributors* thus did not involve a federal criminal investigation. Moreover, *Star Distributors* was decided before *Gillock,* and to the extent that it suggests that the common law speech or debate privilege for state legislators should be as broad as the Speech or Debate Clause protection for federal legislators, *Gillock* compels a contrary conclusion with regard to federal criminal proceedings.

Hampers did not involve a state speech or debate privilege at all. Instead, it involved a federal grand jury subpoena to a state executive branch official to produce state tax records. The court of appeals held that the state tax returns were protected by a common law privilege under Rule 501. But the court based its decision primarily on the balance Congress struck in 26 U.S.C. 6103(i)(1), which governs the disclosure of federal tax return information. The court stated that "[b]eing charged as we are under Rule 501 to look to reason and experience in charting [the] federal evidentiary common law, we think the key has already been forged by the Congress in legislating in 26 U.S.C. § 6103(i)(1) the conditions under which federal tax information may be made available" (651 F.2d at 23). If state tax returns were not protected in the same manner as federal tax returns, the court explained, then Section 6103 could be circumvented (651 F.2d at 23), since much the same information is available from state tax returns as from federal tax returns. Thus, by its terms and its rationale, *Hampers* is limited to subpoenas for state tax returns, and it has no relevance here.[8]

4. The absence of any conflict among the circuits underscores another reason that review of the decision below is unwarranted. The issue raised in the petition simply does not arise with sufficient frequency to justify this Court's review. Petitioners have not cited a single other judicial decision involving a federal grand jury sub-

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[8] Moreover, the court in *Hampers* recognized only a qualified privilege for state tax records under Rule 501. The court explained that a federal grand jury subpoena for tax records could be enforced over the claim of privilege if the grand jury proffered (1) "reasonable cause to believe that a federal crime has been committed," (2) showed "that the information sought will be probative of a matter at issue in the prosecution of that crime," and (3) established "that the same information or equally probative information can not be obtained elsewhere through reasonable efforts" (651 F.2d at 23).

poena to a state legislative committee, and we are aware of none.[9] An issue that has arisen only once in the history of federal prosecution is not one that calls for the exercise of this Court's certiorari jurisdiction, particularly since even in this case the issue has not yet been finally resolved.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 1987

[9] Although ten briefs were filed by amici curiae, only the brief filed by the 75th Minnesota Senate described an instance where a federal grand jury subpoenaed state legislative materials. In that instance, the amicus states (Br. 4), the materials requested were produced without litigation, showing the "a United States Attorney, and state legislative committees can cooperate in investigating possible criminal activity without harming any of their respective functions." Thus, that one example hardly supports the claim that review by this Court is warranted.

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No. 87-570

IN THE

Supreme Court of the United States

October Term, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY BRIEF OF PETITIONERS

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FEDERAL RULE

Federal Rule of Criminal Procedure 17 3

ARGUMENT

The importance of the issue that petitioners request the Court to review is ignored by the government. It is beyond dispute that petitioners consider the issue to be of crucial importance to their constituents, the citizens of the Commonwealth of Pennsylvania. The *amicus curiae* briefs underscore the importance of the issue to legislatures across the country. The National Conference of State Legislatures and the Council of State Governments, representing the legislatures of each of the States and American Territories, filed an *amicus curiae* brief on behalf of their members. Eleven other states or legislatures considered the issue to be of such importance as to file their own brief in addition to that filed by the National Conference on their behalf.[1]

The importance of the privilege to state legislatures and, derivatively, to their constituents justifies review of this case by the Court. Although there may be no reported cases on this precise issue, the need for the issue to be decided by this Court is no less crucial. Petitioners are informed that a number of legislatures across the country have been subpoenaed by federal grand juries. If the decision of the court of appeals is allowed to stand, state legislators can expect a proliferation of federal grand jury subpoenas, with the ensuing distraction, interference and expense of dealing with the subpoenas.

Petitioners have expended great time, money and effort on behalf of Pennsylvania citizens in seeking to uphold the privilege protecting the state legislators from interference and disruption. It is inconceivable how the government can suggest that in order for this Court to review this issue, other legislatures should also spend public monies to litigate the matter in the future. The expenditure of these monies and efforts will be obviated by a

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1. The decision to file an *amicus* brief generally requires an affirmative vote of a legislative committee or the legislature itself. Accordingly, the importance of this issue to the *amici* and their constituents is established by the commitment of considerable time and money in supporting petitioners' position.

final determination by this Court now as to the existence and scope of the privilege.

1. Without citation to authority, the government asserts that the court of appeals' decision "constitutes only an abstract treatment of legal principles" and is interlocutory in nature. Brief for the United States in Opposition ("Brief") at 6. This assertion is unfounded. Even the government recognizes in its own Brief that the issue of the existence of the privilege was decided, stating at page 6: "the court of appeals correctly concluded that state legislators are not entitled to assert a privilege based on the privilege enjoyed by Members of Congress under the federal Speech or Debate Clause." (Footnote omitted). Both of these inconsistent assertions cannot be correct.

The issue squarely before this Court and the court of appeals is and was whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation. Petitioners argued in the court of appeals, and they argue in this Court, that a legislative privilege based on the considerations supporting the Speech or Debate Clause protects state legislators from forced disclosure of documents to a federal grand jury. The court of appeals specifically rejected petitioners' argument, stating:

> Our survey of the suggested rationales for the speech or debate privilege for members of Congress convinces us that after *Gillock* even a qualified speech or debate privilege for state legislators would not realistically serve the purposes that the Speech or Debate Clause is intended to advance. Neither the threat of harassment, the dangers of distraction, nor the potential disruption of confidential communications justifies a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause. We therefore refuse to recognize such a privilege; hence we reject the underlying rationale for the district court's decision.

Pet. App. 21a.

Although the court of appeals alluded to "the possibility of a more narrowly tailored privilege for confidential deliberative communications," Pet. App. 21a, the court specifically stated that it did not hold that a deliberative process privilege protects state legislators. Pet. App. 23a. The government simply misstates the ruling of the court when it asserts at page 5 of its Brief that the court "remanded the case for further proceedings to determine whether any or all of the subpoenaed materials are protected from disclosure under a privilege for confidential deliberative communications." In fact, the court specifically stated that it is not recognizing a confidential deliberation privilege.

The issue before the court was whether a privilege exists, and the court specifically "reject[ed] a qualified speech or debate privilege." Pet. App. 21a. This was a final decision. There can be no doubt that under the court of appeals' decision petitioners will be required to produce documents commanded by the subpoena.

2. At pages 7-8 of its Brief, the government suggests that petitioners and *amici* exaggerate the potential burden of grand jury subpoenas on state legislative committees. But the government misses the mark. The same potential for abuses that supports protection for federal legislators must also support application of the privilege to state legislators. Also, petitioners and *amici* are concerned with the significant distraction and interference of complying with a subpoena as well as moving to quash or limit a subpoena under Rule 17, Fed. R. Crim. P. It is not enough to state that the subpoenaed party may move to quash unreasonable subpoenas. The very real danger lies in the disruption caused by forcing a subpoenaed legislator to take *any* action in response to a subpoena.

3. The government's attempts to distinguish *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), and *In re Hampers*, 651 F.2d 19 (1st Cir. 1981), are specious. The decision of the court below irreconcilably conflicts with these decisions. *Hampers* involved the request of a federal grand jury for documents in aid of a criminal prosecution. The court in *Hampers* did not give the government *carte blanche* to obtain all

requested records. Rather, recognizing the "value of preserving . . . the postures of comity and deference arising from federalism," *id.* at 23, the court rejected the government's argument that it should have unfettered access to the requested documents.

Star Distributors is even more applicable, in that the court stated that "state legislators must be accorded a privilege similar to that of federal legislators." *Id.* at 9. Contrary to the government's assertions, *United States v. Gillock*, 445 U.S. 360 (1980), does not compel a contrary conclusion, except in the peculiar situation before the Court in *Gillock*. In that case, a legislator who was the target of a federal criminal investigation attempted to use the speech or debate privilege to avoid criminal liability. In a case in which a state legislator is not the target of a federal criminal investigation, the Third Circuit's refusal to hold that a privilege protecting federal legislators does not protect state legislators directly contradicts *Star Distributors*.

CONCLUSION

The petition for a writ of certiorari should be granted.

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October Term, 1987

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Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF AMICUS CURIAE OF THE 75th MINNESOTA SENATE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation.

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BRIEF AMICUS CURIAE OF THE 75th MINNESOTA SENATE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF AMICUS CURIAE

Two standing committees of the 75th Minnesota Senate were served with subpoenas *duces tecum* issued by a federal grand jury during the 1987 legislative session. Their response to those subpoenas was governed by the decision of this Court in *United States v. Gillock*, 445 U.S. 360 (1980).

If additional subpoenas are served upon them by the same or another federal grand jury, the response of these senate committees will be governed by the decision of the United States Court of Appeals, for the Third Circuit, unless this Court grants the Petition for a Writ of Certiorari filed by members of the Pennsylvania House of Representatives. The 75th Minnesota Senate respectfully requests this Court to issue the writ so that the decision of the Court of Appeals can be reversed and the decision of this Court in *United States v. Gillock, supra,* can be properly clarified, as was done by the District Court.

During the 1987 legislative session a bill, S.F. No. 122, was introduced in the 75th Minnesota Senate to appropriate $27,000,000 from the corpus of the Northeast Minnesota Economic Protection Trust Fund to the Commissioner of Iron Range Resources and Rehabilitation for "economic rehabilitation and diversification of industrial enterprises" on the economically depressed Iron Range. It was widely assumed that the major purpose of the bill was to make money available to a company called "Endotronics, Inc." for construction of a major research and production facility on the Iron Range, although Endotronics, Inc. was not specifically mentioned in the bill and several stages of review were required before a recipient of the money was finally decided upon.

After the bill's House companion, H.F. No. 92, was passed by the Senate, as amended, the members of the Senate learned that the Federal Bureau of Investigation was investigating Endotronics, Inc. for possible fraud in its attempts to secure financing for its business ventures from private investors. The Senate recalled the bill from the House of Representatives and returned it to the Committee

on Economic Development and Housing, where it remains to this day.

After H.F. No. 92 had been returned to committee, a grand jury impaneled by the United States District Court for the District of Minnesota subpoenaed the chair of the Committee on Economic Development and Housing, as well as the chair of the Committee on Taxes and Tax Laws, to which the bill had also been referred before its passage, and commanded that they produce

> All testimony or transcripts of testimony presented to the committee regarding Endotronics, Inc. and the passage of a bill which authorized the Iron Range Resources and Rehabilitation Board to use up to 24 million dollars for economic development of Northern Minnesota.
> All documents received by the committee in support or opposition to the proposed bill.
> All correspondence or other writings from or directed to Endotronics, Inc.
> All memoranda prepared by members of the committee or any employee affiliated with the committee relating to Endotronics and/or the proposed bill. All copies of proposed contracts between Endotronics, Inc. and the IRRRB from June 30, 1987 (sic) to the present time which would include a proposed 1/87 contract for the sale of 270 Accusyst P machines to the IRRRB at $100,000 each for a total of $27,000,000.

As in the Pennsylvania case, the chairs of the committees had not been accused of any crime, so this Court's decision in *Gillock* did not necessarily eliminate their legislative immunity from judicial process. But their committees were no longer planning any action on the bill; their committees were not engaged in an investigation of Endotronics, Inc.,

other than to inquire of the Governor why he had been such a strong supporter of the bill; and none of the information that the subpoenas commanded to be produced was private or confidential or otherwise of a nature that the chairs did not want to be publicly revealed. No harm would be done to the orderly working of the legislative process by producing the documents, so the documents were produced.

The experience of the 75th Minnesota Senate shows that a federal district court, a United States Attorney, and state legislative committees can cooperate in investigating possible criminal activity without harming any of their respective functions. However, the 75th Minnesota Senate is gravely concerned that a less conscientious United States Attorney might frustrate a legislative committee from doing its constitutional duty. Where, as in Pennsylvania, a legislative committee has been diligently performing its duty to gather facts relevant to the need for future legislation, and has discovered evidence of crimes possibly having been committed, there will be a temptation for a less conscientious prosecutor to rest on the work done by the committee and not undertake his own independent investigation. If the committee is still performing its duty, as was the committee of the Pennsylvania House, the intervention of the United States Attorney might prevent it from properly completing its work. Where the information sought by the prosecutor is readily available directly from the sources used by the committee, there is no compelling reason why the committee should be diverted from its own constitutional duties just to make it easier for the United States Attorney to do his.

While the members of the 75th Minnesota Senate are concerned about the immediate damage that a less conscien-

tious United States Attorney could do to their lawmaking function, they are even more concerned about the long-term damage that could result if the United States Attorney were allowed free access to their confidential documents and conversations with constituents. The decision of the Court of Appeals in this case not only refuses to recognize a qualified speech or debate privilege for state legislators under federal common law, it also refuses to recognize a confidentiality privilege for state legislators. Unsure that their communications will remain confidential, the people may become reluctant to confide in their legislators. Their ability to petition their state legislature for a redress of grievances will be abridged.[1]

STATEMENT OF THE CASE

The 75th Minnesota Senate essentially adopts the petitioners' statement of the case, but calls the Court's attention to a few salient facts.

The subpoena at issue in this case was not searching for evidence of criminal misconduct by a legislator. The members of the legislative committee upon which the subpoena was served were not the targets of the grand jury's inquiry; there is no suggestion that they had done anything wrong.

The members of the legislative committee upon which the subpoena was served were already engaged in a duly authorized and bona fide investigation of their own into subject matter within their jurisdiction. Not until the legislative committee was three years into its investigation was the interest of the United States Attorney aroused; aroused because of the work that the legislative committee

[1]Under Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

was doing. The United States Attorney could have been engaging in his own investigation of the subject matter, but the legislative committee got their first!

The legislative committee was in hot pursuit of its quarry. Substantial information had already been released to the public, and was provided to the United States Attorney. But the committee also possessed information that it did not intend to make public until produced at its own hearings within the next two weeks. The United States Attorney refused to allow the committee to pursue its inquiry in accordance with the schedule it had developed over the previous three years and instead commanded that all this information be produced immediately.

The documents sought are not merely the fruit of the legislative committee's labor, they include the committee's own memory of its labor, as shown by internal memoranda, interview notes, record review notes, and correspondence. The United States Attorney seeks to know, not only what the legislative committee knows, but how it found out what it knows.

ARGUMENT

I.

The Decision of the Court of Appeals is in Conflict with this Court's Decision in Tenney v. Brandhove and Misconstrues this Court's Decision in United States v. Gillock, Which Needs to be Clarified.

The political concept of legislative independence was most forcefully stated by the English Parliament on January 30, 1649, when Charles I was beheaded according to its order. *See* 2 G.M. Trevelyan, *History of England* 179-

203 (3rd. ed. reissue 1952); *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951). It was codified as the legal doctrine of legislative immunity in the English Bill of Rights in 1689 as

> That the Freedom of Speech, and Debates or proceedings in Parliament, ought not to be impeached or questioned in any Court of Place out of Parliament. (Quoted in *Tenney v. Brandhove,* 341 U.S. 367, 372 (1951).)

What was achieved in England by force of arms was carried to the United States by force of reason and continued in the Articles of Confederation as

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress. *Id.*

and included in the United States Constitution, Article I, Section 6, as

> [F]or any speech or debate in either house [the members] shall not be questioned in any other place.

Although legislative immunity for members of Congress thus has a basis in the United States Constitution, and legislative immunity for members of a state legislature has a basis in the constitutions of most states, *see Tenney v. Brandhove,* 341 U.S. 367, 375-76 n. 5 (1951), this Court recognized in *Tenney* that legislative immunity is not simply a matter of codified constitutional law — it is also a part of the federal common law. It is not a doctrine that needs now to be created by the courts, but rather one whose historical meaning needs only to be explained by the courts "in the light of reason and experience." Fed. R. Civ. P. 501.

In *United States v. Gillock*, 445 U.S. 360 (1980), this Court made clear that, in a federal prosecution, the privileges of a state legislator are governed by federal common law, rather than by either the Speech or Debate Clause of the federal constitution or a speech or debate clause in the state's constitution. When considering what federal common law evidentiary privileges were available, you considered the reasons for the constitutional privileges: separation of powers and legislative independence. *Id.* at 369. When considering the first reason, you found that the doctrine of separation of powers, simply did not apply to the *federal* prosecution of a *state* legislator, since "the Supremacy Clause dictates that federal enactments will prevail over competing state exercises of power." *Id.* at 370. But when considering the second reason, you balanced the need for legislative independence against the need to enforce the federal criminal statutes. You found that, where recognizing the privilege would cause evidence of criminal conduct by a legislator to be excluded from proof at trial, "recognition of an evidentiary privilege for state legislators for their legislative acts would impair the legitimate interest of the Federal Government in enforcing its criminal statutes with only speculative benefit to the state legislative process." *Id.* at 373. Therefore, you refused to recognize it in that case.

In this case, the Court of Appeals made no mention of *Tenney v. Brandhove* and this Court's recognition of the speech or debate privilege for state legislators as part of the federal common law. The Court of Appeals criticized the District Court for not having decided "whether a qualified privilege exists or should exist." *In re Grand Jury*, 821 F.2d 946, 955 (3rd Cir. 1987). Instead, the Court of Appeals focused on whether is should *create* a speech or debate privi-

lege for state legislators based on what it found in the United States Constitution for members of Congress. Instead of reviewing a page of history it wrote less than a volume of logic and concluded that, contrary to *Tenney*, "we do not believe that the needs of state legislators for confidentiality justify the creation of a qualified privilege for the full range of legislative activities normally protected by the Speech or Debate Clause." 821 F.2d at 958.

The Court of Appeals misconstrued *Gillock* as having undermined the rationale for a federal common law speech or debate privilege for state legislators in all criminal cases, rather than only in prosecutions where a legislator was the target.

This Court should act now to clarify that, even after *Gillock*, a qualified speech or debate privilege for state legislators still lives in the federal common law.

II.

The Decision of the Court of Appeals Conflicts with Decisions of the United States Courts of Appeals for the First and Second Circuits.

The 75th Minnesota Senate adopts the argument of petitioners, Petition 12-14, more fully describing how the decision below conflicts with decisions of the United States Courts of Appeals for the First and Second Circuits in the cases of *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2nd Cir. 1980); and *In re Hampers*, 651 F.2d 19 (1st Cir. 1981).

CONCLUSION

This Court should grant certiorari to clarify the reach of its decision in *United States v. Gillock* and resolve the conflict among the circuit courts on this important question of federal common law.

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UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES AND THE COUNCIL OF STATE GOVERNMENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-570

NICHOLAS COLAFELLA, K. LEROY IRVIS,
JAMES J. MANDERINO, MATTHEW J. RYAN,
and the BIPARTISAN COMMITTEE FOR THE
ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,
Petitioners,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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BRIEF *AMICUS CURIAE* OF THE NATIONAL CONFERENCE OF STATE LEGISLATURES AND THE COUNCIL OF STATE GOVERNMENTS IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

INTEREST OF THE *AMICI CURIAE*

Amici curiae, the National Conference of State Legislatures, an organization representing the legislatures of the 50 States and American territories and commonwealths, and the Council of State Governments, a na-

tional organization representing all branches of state government including state legislatures, seek to further the vitality and autonomy of state legislatures within the system of federalism created under our Constitution. This case is of critical importance to States and their legislatures because the Third Circuit's decision threatens the integrity of the legislative process that is at the core of the Article IV, section 4, guarantee of a republican form of government in the States.

In this case, a United States Attorney caused a federal grand jury subpoena to be issued and served upon an investigative committee of the Pennsylvania legislature while it was engaged in an official legislative inquiry. Allowing a federal executive official to intrude into a State's legislative process in a case such as this, where no state legislator is alleged to be the subject of the federal inquest, and without establishing a compelling need or exploring less intrusive alternative means of obtaining evidence, endangers state sovereignty in a manner never sanctioned by this Court. Such intrusion upsets the delicate balance between state and federal powers, "a balance designed to protect our fundamental liberties." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 572 (1985) (Powell, J., dissenting).

The gathering of information by a state legislature is a core legislative function that goes to the heart of state sovereignty; it has been exercised from time immemorial by English and colonial legislatures and it is recognized by this Court as an incident of fundamental legislative power. Potts, *Power of Legislative Bodies To Punish For Contempt*, 74 U.Pa.L.Rev. 691, 708-725 (1926) (collecting colonial and state precedents for contempt in the course of legislative inquiries); Landis, *Constitutional Limits on the Congressional Power of Investigation*, 40 Harv.L.Rev. 153, 156 (1927); *McGrain v. Daugherty*, 273 U.S. 135, 166 (1927) (citing state court cases sustaining power of legislature to compel testimony).

The state legislatures, represented by the National Conference of State Legislatures and the Council of State Governments, will be adversely affected by any rule that permits federal prosecutors, through the grand jury, to forage among institutional records generated by state legislative inquiries.

Because of their vital interest in preventing the erosion of the federal and republican structure of our government, *amici* respectfully urge the Court to grant the petition for certiorari.[1]

STATEMENT OF THE CASE

Amici essentially adopt the petitioners' statement of the case. From the perspective of *amici* as organizations representing state legislatures, several facts merit special emphasis in the Court's consideration of the petition.

The subpoena at issue in this case was served upon a *pre-existing* and *ongoing* state legislative committee engaged in a duly authorized and bona fide investigation into subject matter within its jurisdiction: compliance with the state Steel Products Procurement Act (requiring purchase of domestic steel for construction projects) in connection with the expansion of the State Capitol building in Harrisburg, Pennsylvania, the very edifice housing the state legislative chambers and offices; and review of the administration of that Act by the state Department of General Services.

The legislative investigation was authorized by resolution of the Pennsylvania legislature. As part of the investigation, the Committee received testimony from Walter Baran, the Secretary of the Department of General Services, over which the Committee had oversight responsibility. It was this witness, himself a subject of the Com-

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[1] Under Rule 36 of the Rules of this Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

mittee's inquiry, at whose request the United States Attorney for the Middle District of Pennsylvania began his investigation and convened the grand jury that issued the contested subpoena. Nothing in the record suggests that the United States Attorney had any independent interest in the subject matter being investigated by the Committee, or in its sources or work product, until the request was lodged. But for Baran's own initiative in seeking his assistance, the United States Attorney might never have become involved.

The materials sought are documents integral to the conduct of the legislative committee investigation, not merely incidental byproducts of the Committee's inquiry. They include investigative reports, memoranda and summaries from interviews of witnesses by committee employees, handwritten and typewritten notes of such memoranda and interviews, including purely internal committee communications not directly characterizing the statements of persons interviewed. *Amici* believe that the peculiarly sensitive and deliberative nature of the materials sought is highly significant to the legal issues presented for review.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's Denial Of Protection To Ongoing Legislative Activity Is Inconsistent With The Precedents Of This Court And Other Courts.

The Third Circuit's ruling that, under the Supremacy Clause, a subpoena issued upon the initiative of the federal executive branch takes precedence over a state legislature's interest in protecting its legislative processes from intrusion, 821 F.2d 946, 954, is inconsistent with prior decisions of this Court and other courts. In denying protection to the state legislative committee, the court of appeals relied primarily on *United States v. Gillock*, 445 U.S. 360 (1980), which does not, however, support the court's decision. *Gillock* held only that an individual

state legislator's legislative acts could be used in evidence at his trial on federal criminal charges because the separation-of-powers concerns among co-equal federal branches undergirding the federal speech or debate privilege were not present in a federal prosecution of a state official. In *Gillock*, upholding a speech or debate privilege for a state legislator by barring use of specific evidence at trial would have served to immunize conduct proscribed by law by Congress. Here, of course, upholding the legislature's institutional claim would have no such effect; state legislators are not targets of the grand jury investigation.

In *Gillock*, the interference in the state legislative process was incidental because only an individual legislator unlawfully exploiting his position was targeted for prosecution; here, the interference is directly with the processes of the legislature as an institution. Another court of appeals has recognized that:

> . . . even though material comes to a legislative committee by means that are unlawful or otherwise subject to judicial inquiry the subsequent use of the documents by the committee staff in the course of official business is privileged legislative activity.

McSurely v. McClellan, 553 F.2d 1277, 1296 (D.C. Cir. 1976) (en banc), *cert. dismissed sub nom. McAdams v. McSurely*, 438 U.S. 189 (1978). In sum, it is the information-gathering process of the legislature itself that is jeopardized—totally unlike *Gillock*, which involved the public legislative acts of an individual legislator, not the documentary and testimonial products of an investigation by the legislative body.

In denying the legislature's claim, the Third Circuit has set itself in clear and irreconcilable conflict with at least one other court of appeals. In *In Re Hampers*, 651 F.2d 19 (1st Cir. 1981), the court quashed a federal grand jury subpoena to the Massachusetts Commissioner of Revenue in a federal investigation, holding that the federal interest in seeking information did not outweigh the

state interest under principles of comity and federalism. *Id.*, at 23. A federal grand jury was investigating an arson-insurance fraud scheme and sought evidence from the state Commissioner of Revenue concerning the non-payment of sales tax on meals and beverages of a restaurant that suspiciously burned down. The information sought—collected by the Commission in furtherance of its authority under state law—was deemed protected. The court held that the federal grand jury must proffer reasonable cause to believe that a federal crime has been committed, that the information sought is probative of a matter at issue, and that the information cannot be obtained elsewhere through reasonable efforts. *Id.* A state legislature, no less than a state administrative agency, is due the deference and comity accorded the State by the First Circuit in *Hampers*.

The Third Circuit's opinion also ignores the substantial jurisprudence developed by this Court and other courts protecting the processes of legislative investigative committees. These precedents emphasize the fundamental premise that the exercise of legislative factfinding is a core function of both state and federal sovereignty. *Hannah v. Larche*, 363 U.S. 420, 440-44 (1960) (Civil Rights Commission's purely legislative investigative function did not vest certain due process rights in persons under investigation); *Tenney v. Brandhove*, 341 U.S. 367, 379 (1951) (state legislative committee's actions in reading into record statements of alleged criminal record of plaintiff constituted acts "in a field where legislators traditionally have power to act"); *Green v. DeCamp*, 612 F.2d 368, 371 (8th Cir. 1980) (state legislative committee's report criticizing homicide investigation undertaken by city police chief is part of legitimate legislative investigation).

The jurisprudence developed by this Court respecting the sanctity of the federal legislative process from executive branch interference under the federal Speech or

Debate Clause, U.S. Const., art. I, § 6, cl. 1, is itself based largely on colonial and state precedents. The Court has drawn frequently from cases involving colonial and state legislative experience to buttress its interpretation of the federal Speech or Debate Clause as a bulwark against executive branch interference. *E.g., United States v. Helstoski*, 442 U.S. 477, 493 (1979) (citing with approval and relying upon *Coffin v. Coffin*, 4 Mass. 1 (1808) in interpreting federal speech or debate privilege); *Powell v. McCormack*, 395 U.S. 486, 501 (1969) (citing *Tenney v. Brandhove*, in construing scope of Speech or Debate Clause in suit by federal legislator charging unconstitutional exclusion from House of Representatives). *See also McGrain v. Daugherty*, 273 U.S. at 174 ("We are of opinion that the power of inquiry—with process to enforce it—is an essential and appropriate auxiliary to the legislative function. It was so regarded and employed in American legislatures before the Constitution was framed and ratified."). The court of appeals' treatment in this case of the State's sovereign interest in free and unfettered legislative inquiry is inconsistent with and contrary to these precedents.

As the Court recognized in *Tenney*, there is no reason to believe that Congress, in enacting the civil rights statute, 42 U.S.C. § 1983, intended to divest state legislatures of protection for their processes; nor is there any reason to believe that Congress so intended in enacting any of the criminal statutes providing authority for the grand jury investigation in this case.

Furthermore, as *Eastland v. United States Servicemen's Fund*, 421 U.S. 491, 509-10 n.16 (1975), emphasizes, interference with an *ongoing* legislative committee investigation is especially to be guarded against in the interest of preserving legislative branch independence.

The United States House of Representatives and the Senate have successfully resisted similar subpoenas for

their institutional records from civil litigants and grand juries on the grounds that such demands intrude on legislative processes and inhibit free and vigorous legislative inquiry. *E.g.*, *In Re Guthrie*, 733 F.2d 634 (4th Cir. 1984) (subpoena to Clerk of House for records of Select Committee on Aging investigation); *United States v. Ehrlichman*, 389 F. Supp. 95, 97 (D.D.C. 1974), *aff'd on other grounds sub nom. United States v. Liddy*, 542 F.2d 76 (D.C. Cir. 1976) (executive session transcript).

The courts have sustained the right of the legislature to maintain the inviolability of its legislative records not solely by relying on the Speech or Debate Clause, but because of the manifest need for legislative independence. In *Hearst v. Black*, 87 F.2d 68, 71 (D.C. Cir. 1936), the court determined that it could not restrain use of documents by a Senate committee, even though unconstitutionally seized, because "the universal rule . . . is that the legislative discretion in discharge of its constitutional functions, whether rightfully or wrongfully exercised, is not a subject for judicial interference." While the court based its reasoning on separation of powers grounds, it did so without reference to any textually based privilege like speech or debate, and inferentially relied on state legislative experience. *See id.*, at 72, quoting from *Alpers v. San Francisco*, 32 F. 503, 506 (C.C. 1887) (attempt to enjoin the exercise of legislative power is not within jurisdiction of court of equity: "This no one will question as applied to the power of the legislature of the state").

State legislative independence is fundamental to the full exercise of state sovereignty, and nothing in *Gillock* is to the contrary. This Court has held that the decision to locate a state capitol involves "peculiarly state powers," *Coyle v. Oklahoma*, 221 U.S. 559, 565 (1911), and that a statute passed by Congress establishing conditions under which a new State was to be admitted to the union did not "deprive a new State of any of those attributes essential to its equality in dignity and power

with other States." *Id.*, at 568. The power of the legislature to conduct its business is plainly even more "essential to its equality in dignity and power" than its power to decide the location of its capitol. "Just as surely as the Framers envisioned a national government capable of solving national problems, they also envisioned a republic whose vitality was assured by the diffusion of power not only among the branches of the Federal Government, but also between the Federal Government and the States." *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528, 581 (1985) (O'Connor, Powell, Rehnquist, JJ., dissenting).

The court of appeals in this case gave no weight or consideration to these precedents, and this Court should grant certiorari to resolve the conflict with the decisions of the other circuits and this Court.

II. This Court Should Invoke Its Supervisory Power Over Lower Federal Courts To Resolve The Issue In This Case Because It Presents The Potential For Recurring Confrontation Between Grand Juries And State Legislatures.

Whether the lower federal courts should use their processes to enforce grand jury subpoenas directed to state legislatures for institutional records evidencing their internal and deliberative processes is a question of great importance over which this Court should invoke its supervisory and administrative jurisdiction.

This Court has many times exercised its certiorari discretion to supervise the lower federal courts and to insure the proper functioning of the federal judiciary. It has done so to consider important procedural issues, like the construction of the federal rules of civil or criminal procedure, *Hickman v. Taylor*, 329 U.S. 495 (1947), *Schlagenhauf v. Holder*, 379 U.S. 104, 109 (1964), the power of removal to federal courts, *Thermatron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1976), or the scope of

the federal contempt power, *Sacher v. United States*, 343 U.S. 1 (1952).

The appropriateness of using the federal grand jury to subpoena institutional legislative documents from a state legislature under Federal Rule of Criminal Procedure 17 is an issue that falls within the Court's supervisory and administrative jurisdiction, particularly since it implicates sensitive relationships between federal officers, United States Attorneys, and state legislatures in all 50 States. *See Rizzo v. Goode*, 423 U.S. 362, 379 (1976) (principles of federalism must be given weight in determining "availability and scope of equitable relief" that can be imposed by federal courts in a system "subsisting side by side with 50 state judicial, legislative and executive branches").

The grand jury has been described as an independent entity, that is, not wholly a part of either the judicial or executive branch. Though the United States Attorney, an executive branch official, may cause subpoenas to be issued without resort to or consultation with the court, enforcement lies only with the processes of the court. And this Court has not hesitated to control the use of the subpoena and enforcement processes of the lower courts. For example, see *United States v. LaSalle National Bank*, 437 U.S. 298, 311-316 (1978) (Court announced standards for district court enforcement of IRS summons where recipient alleged that agency was using its civil investigative authority to gather evidence for a criminal prosecution); *McNabb v. United States*, 318 U.S. 332, 340 (1943) (on basis of supervisory power over the administration of justice, Court excluded illegally obtained confession from use at criminal trial).

The court of appeals held that the law protects state legislators only against civil suit, and not against a grand jury subpoena. In doing so, it misconceived the nature of a third party subpoena to the legislature

acting as a legislature and failed to distinguish that case from one involving an individual legislator targeted for prosecution. The former resembles more a civil suit, for which protection traditionally applies under *Tenney*, than it does a criminal proceeding.

The proceedings on the legislature's motion to quash are both collateral to the issue of criminality with which the grand jury is concerned, and distinct from any proceedings or actions which might arise from the grand jury's actions by way of indictment or report. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949). This case, like *Tenney*, therefore, involves a civil proceeding of the kind for which state legislatures have been accorded protection, rather than a criminal proceeding. *Cf. United States v. Nixon*, 418 U.S. 683, 713 (1974) (trial subpoena by special prosecutor for evidence relevant to pending criminal case overcame presumptive presidential privilege).

If the rule announced by the Third Circuit in this case takes hold, the result will be further confrontation between United States Attorneys and state legislatures.

It is important for this Court to clarify the power of the grand jury in this regard to assure viability of coordinate state legislative processes and to preserve the power of the States to act in areas essential to the perpetuation of their sovereignty.

CONCLUSION

The Court should grant certiorari to review and resolve the conflict between the Third Circuit and this and other courts on this important issue.

Respectfully submitted,

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Case No. 87-570

IN THE
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October Term, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, and THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

v. Petitioners,

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF FRED A. RISSER, PRESIDENT OF THE WISCONSIN SENATE, AND TOM LOFTUS, SPEAKER OF THE WISCONSIN ASSEMBLY, AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether members of an investigative committee of the State Legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their

investigative documents and reports served during an ongoing legislative investigation?

INTEREST OF THE AMICI CURIAE[1]

Amici are State Senator Fred A. Risser and State Representative Tom Loftus, President of the Wisconsin Senate and Speaker of the Wisconsin Assembly, respectively. Under Wisconsin Constitution, art. IV, s. 8, which provides in part that each House may determine the rules of its own proceedings, the President of the Senate generally represents and stands for the Senate and the Speaker of the Assembly generally represents and stands for the Assembly. (See 1987 Wisconsin Senate Rule 1 (3) and 1987 Wisconsin Assembly Rule 3 (1) (k).)

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[1]Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

In Wisconsin, the power to determine the state's policies and programs lies primarily in the legislative branch of state government. Comprised of 99 Representatives and 33 Senators, the Wisconsin Legislature virtually meets in continuous biennial session. (See Wisconsin Constitution, art. IV, ss. 1 and 2 and ss. 13.01 and 13.02, Stats.)

The full-time nature of the Wisconsin Legislature is expressed, for example, in the session schedule for the 1987-88 Biennium:

1/5/87	1987 Inauguration
1/6 to 1/26/87	Committee Work Period
1/27 to 2/6/87	Floorperiod Debate
2/9 to 3/16/87	Committee Work Period
3/17 to 3/19/87	Floorperiod Debate
3/20 to 4/20/87	Committee Work Period
4/21 to 6/26/87	Floorperiod Debate
6/29 to 10/5/87	Committee Work Period

10/6 to 10/30/87	Floorperiod Debate
11/2/87 to 1/25/88	Committee Work Period
1/26 to 3/25/88	Floorperiod Debate
3/28 to 5/16/88	Committee Work Period
5/17 to 5/19/88	Floorperiod Debate
5/20 to 12/30/88	Committee Work Period
1/3/89	1989 Inauguration

During floorperiod debate, the Wisconsin Legislature undertakes the archetypical legislative duty of consideration and passage of bills. During both the times of floorperiod debate and committee work periods, the Wisconsin Legislature reviews legislative proposals, reviews all administrative rules proposed by the executive branch, considers study proposals for major recodifications and modifications of the Wisconsin statutes and conducts committee investigations.

In order to maintain the continuity of the work of the Wisconsin Legislature, the State of Wisconsin has adopted constitutional provisions and has enacted statutes to preserve the integrity of the legislative process from undue interference. These policy statements can be found in the following provisions:

> 1. Wisconsin Constitution art. IV, s. 15. EXEMPTION FROM ARREST AND CIVIL PROCESS. Members of the legislature shall in all cases, except treason, felony and breach of the peace, be privileged from arrest; nor shall they be subject to any civil process, during the session of the legislature, nor for fifteen days next before the commencement and after the termination of each session.
>
> 2. Wisconsin Constitution art. IV, s. 16. PRIVILEGE IN DEBATE. No member of the legislature shall be liable in any civil action, or criminal prosecution whatever, for words spoken in debate.

> 3. Section 757.13, Stats. CONTINUANCES; LEGISLATIVE PRIVILEGE. When a witness, party or an attorney for any party to any action or proceeding in any court or any commission, is a member of the Wisconsin legislature, in session, that fact is sufficient cause for the adjournment or continuance of the action or proceeding and the adjournment or continuance shall be granted without the imposition of terms.

The business of the Wisconsin Legislature has been faced with actual and threatened interruption by subpoenas served both at the state and federal levels. For example, in Gaylor v. Risser, No. 78-C-146 (W.D. Wis.), the President Pro Tem and the Chief Clerk of the Senate both were served with subpoenas in a case challenging the practice of both Houses of the Wisconsin Legislature of authorizing members of the clergy to open each day's session with a prayer and compensating those clergy from public funds. The action was dismissed

in August 1983. Also, in Board of School Directors of the City of Milwaukee, et al. v. State of Wisconsin, et al., No. 84-C-877 (E.D. Wis.), attorneys for the plaintiffs threatened to serve various members of the State Legislature with subpoenas during a time of floorperiod debate in the current legislative session.

If the decision of the Third Circuit in this case remains in force, a United States Attorney will remain free to subpoena the records of a State Legislature and require members to appear before a grand jury at any time. Certainly in the case of the full-time Wisconsin Legislature, this sort of activity would cause great disruption in the state's business. If the Third Circuit decision is not reversed or modified, the interests of the Wisconsin

Legislature in the freedom of fact finding, legislative oversight and legislating will be adversely affected.

In presenting this statement of interest, amici are not advocating a state legislative system that is totally immune from federal process, especially in view of the Court's decision in United States v. Gillock, 445 U.S. 360 (1980). The State of Wisconsin does not favor a form of government that has no accountability. In fact, the state has a long tradition of open government, which is intended to ensure that the Legislature and its individual members and committees are accountable for their actions. (See, generally, ch. 19, Stats.) However, some form of state legislative immunity from federal process is necessary in order that the business of a State Legislature may proceed in a

relatively unimpeded manner and that State Legislators are accorded the respect to which they are entitled in our federal system of government.

A decision by the Court in this case will assist in clarifying the relationship between the need of federal prosecutors for information and state legislative immunity and prerogatives.

ARGUMENT

This brief fully incorporates the statement of the reasons for granting the writ made by the petitioners in their petition for a writ of certiorari.

CONCLUSION

For the foregoing reasons, amici respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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BRIEF OF AMICI CURIAE FOR THE STATE OF MARYLAND, THE MARYLAND GENERAL ASSEMBLY; THE STATE OF OHIO, THE OHIO GENERAL ASSEMBLY; THE STATE OF TENNESSEE, THE TENNESSEE GENERAL ASSEMBLY

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No. 87-570

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BIPARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

QUESTION PRESENTED FOR REVIEW

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

INTEREST OF AMICI CURIAE

The legislatures of the states of Maryland, Ohio and Tennessee have been duly elected and entrusted with the power to enact laws for the public good of all the people in these states. These legislatures believe that the power to legislate is a public trust of the highest order. The power to legislate imparts the duty to protect the social relationships, economic welfare and political and personal freedoms of every individual in the state. The citizens of these states have entrusted their legislatures with the duty to enact laws to educate their children, protect the state's natural resources, regulate the fairness of commercial transactions, guarantee civil and political liberties, define and punish criminal conduct, provide for the poor, the handicapped, and the mentally disabled, promote the economic welfare, preserve the public safety, and assure the integrity and fiscal solvency of the state. The list could go on and on, for indeed no exhaustive list of state legislative duties could ever be written.

It is apparent that, if state legislatures are to fully and effectively discharge the public trust, they must have the ability to freely and independently investigate as well as debate the virtually unlimited number of issues that demand legislative attention. The people rightfully expect and depend on the existence of deliberate, enlightened and responsive state legislation. If that is to occur, state legislatures must continue to have unfettered fact-finding ability, except of course where such need is properly subordinate to constitutionally protected civil liberties. State legislatures, certainly no less than their federal counterparts, have a need to have the independence and integrity of their investigatory processes and work product protected from outside influence, harassment or disruption. The need exists, for the effect is the same, regardless of whether the interference threatened is from the executive or judicial branch or the state or federal level.

The Third Circuit's decision in this case will seriously undermine the state legislatures' continued ability to engage in meaningful fact-finding investigations. The conclusion that

members of a state legislative investigative committee, who are not themselves the targets of any federal criminal investigation, must comply with a federal grand jury subpoena for their documents and testimony during an ongoing investigation imposes significant burdens and possibly chilling effects on the legislative process.

State legislatures typically do not employ large staffs. The work of the investigative committee is most often done by the legislators themselves and one or two aides. Nor do legislative committees have the ability to devote unlimited hours and resources to a particular investigation. There will be any number of competing legislative priorities during the course of a single legislative session. The legislative branch, unlike the executive branch, is not neatly compartmentalized into divisions, bureaus and departments separately focused on discrete concerns. If the members of legislative committees are subject to the added burden of complying with, or defending against, the demands of federal prosecutors for all their records, reports and documents, or for their personal testimony about their impressions and opinions, the threat of disruption is very real. The Third Circuit purports to assuage this fear of disruption by reference to the protection from undue burden available through Rule 17 of the Federal Rules of Criminal Procedure. Petition at p. 19a. The burden of defending against an unreasonably broad or intrusive subpoena request, however, may be as threatening and disruptive as compliance in the context of the legislative fact-finding process.

The interest of the amici state legislatures in this case is not, however, driven only by concerns of administrative burdens or disruptions. An overriding concern is the possibly chilling effects of the Third Circuit's conclusion on the availability of information needed by state legislative committees. State legislative committees and federal prosecutors obviously have different goals and objectives. The former are primarily concerned with prophylactic and remedial measures. The latter focus on enforcement and punishment. The public is best served when both these interests are allowed to fully

flourish, and both interests are best achieved when they are pursued independently of the other. The independence of the federal prosecutors is rightfully protected by the courts, and the historical independence of state legislatures is entitled to the same protection.

Because state legislatures are not large bureaucratic organizations, the effectiveness of their fact-finding function is very dependent on the willingness of private citizens to voluntarily come forward and disclose information pertinent to legislative concerns. It is unquestionable that potential witnesses will be less likely to fully and candidly cooperate with state legislative committees if they know that information must be relayed, on demand, to the federal prosecutors as well. This chilling effect on voluntary cooperation would seriously undermine the state legislative fact-finding function.

This case presents a very real and practical issue of federalism. The amici state legislatures are not suggesting that the role of the federal prosecutor is less important than their own role. They are not suggesting that prophylactic legislative measures are always more important than criminal prosecutions. State legislators, like their federal counterparts, author the criminal laws and expect those laws to be aggressively enforced. These state legislatures do, however, genuinely and vigorously contend that the effectiveness of their endeavors is dependent in large measure on their ability to conduct fact-finding investigations, and that they should be allowed to conduct such investigations without the interference of federal executive officials. The remedial goals of state legislatures and the enforcement goals of the federal prosecutors should be complementary not competing. Both goals are equally important to the public order and both will best flourish if each remains independent of the other. This case presents a unique opportunity to reaffirm the principles of comity inherent in our constitutional system and clearly warrants the plenary attention of this Court.

REASONS FOR GRANTING THE WRIT
ARGUMENT

These amici state legislatures agree with and incorporate by reference herein the arguments in support of granting certiorari articulated by Petitioners in their petition at pages six through seventeen.

It simply cannot be questioned that legislative investigation is an activity well within the legitimate legislative sphere. Factual investigations are a necessary and unavoidable step in the legislative process. Indeed in most instances state legislatures are required by federal constitutional principles to predetermine that their enactments have a rational basis. In some instances they also must assure themselves that their enactments are justified by a compelling state interest that cannot be achieved by any less restrictive measure. It is apparent that if state legislatures are to meet these federal constitutional demands, they must be free to fully and expeditiously investigate the necessity for, and reasonableness of, legislative proposals. As this Court noted in *Eastland v. United States Servicemen's Fund,* 421 U.S. 491, 504 (1975), "[a] legislative body cannot legislate wisely or effectively in the absence of information respecting the conditions which the legislation is intended to affect or change." It is equally true that state legislatures cannot legislate constitutionally in the absence of information respecting the reasons for, and the necessity and likely impact of, proposed legislation.

State legislatures are not large, bureaucratic organizations. The time and resources they have to devote to a particular investigation are frequently limited. State legislatures need to be able to rely on the voluntary cooperation of state executive officials and private citizens and organizations to assist them in collecting their facts and generating the ideas and proposals that will ultimately support their legislative enactments. It is simply unreasonable to expect that state legislative investigations can continue to be conducted in an effective manner if such investigations are subject to outside interference from federal executive officials, and the attendant burdens and chilling effects of such interference.

The present case presents a substantial question of federal-state relationships. The decisions of this Court would fully protect congressional investigative committees from the compulsory disclosure of their work product, impressions and opinions by federal prosecutors under the facts in this case. *Eastland v United States Servicemen's Fund,* 421 U.S. 491 (1975); *Gravel v. United States,* 408 U.S. 606 (1972). The decisions of this Court also fully support the state legislatures' legitimate expectation that their common law legislative privilege will be on a parity with the federal constitutional privilege. *Tenney v. Brandlove,* 341 U.S. 367 (1951); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.,* 446 U.S. 719 (1980). The amici state legislatures respectfully urge the Court to take up this case for the purpose of reaffirming this important principle. As was so eloquently stated by the Second Circuit Court of Appeals in *Star Distributors, Ltd. v Marino,* 613 F.2d 4, 9 (2nd Cir. 1980):

> [U]nder our system of federalism, the role of the state legislature is entitled to as much judicial respect as that of Congress. . . .The need for a Congress which may act free of interference by the courts is neither more nor less than the need for unimpaired state legislatures. We show no more than "a proper respect for state functions," *Younger v. Harris,* 401 U.S. 37, 44 91 S.Ct. 746, 750, 27 L.Ed. 669 (1971), in holding that state legislators must be accorded a privilege similar to that of federal legislators.

The Third Circuit has concluded that "the Supremacy Clause sanctions 'interference' with state legislatures by the federal executive and judiciary as long as they pursue legitimate federal aims." Petition at p. 17a. That conclusion runs afoul of the principles of federalism and comity that have preserved harmony in our federal and state relationships for now over two hundred years. The idea that a federal executive official may intrude upon the legitimate activities of a state legislature whenever that official can claim a legitimate federal objective is simply unfounded in our federal system. If that idea, which is critical to the Third Circuit's reasoning in this

case, is sustained and allowed to grow, it could irrevocably strain state and federal relations. Our system of federalism is founded on the principle that the federal government will respect the ability and independence of each state to act on legitimate matters of local concern. The deliberative and investigatory activities of a state legislature are state functions of the highest order, and are entitled to be conducted free of federal interference, so long as such activities do not infringe substantive constitutional rights or negate important federal interests.

Amici appreciate the reasons why this Court held in *United States v. Gillock*, 445 U.S. 360 (1980), that the principles of comity had to yield to the important federal interests at stake in that case. But those same reasons are not present in this case. The issue in *Gillock* was "whether the federal courts in a federal criminal prosecution would recognize a legislative privilege barring the introduction of evidence of the legislative acts of a state legislator charged with taking bribes or otherwise obtaining money unlawfully through exploitation of his position." 445 U.S. at 361-362. Amici are not suggesting that legislative immunity should protect state legislators against federal prosecution based on their own misconduct. They are, however, contending that common law legislative immunity should continue to protect the independence and effectiveness of state legislative institutions, absent a claim of legislative impropriety. That issue was not addressed in *Gillock*.

The present case differs from *Gillock* in at least three significant respects. First, no member of the state legislature was a subject or target of the federal criminal investigation. Petition at p. 39a. Second, the petitioners in this case are not seeking to suppress the use of evidence in a federal criminal prosecution. The recognition of a privilege in this case will not frustrate or negate the ability of the federal prosecutors to conduct their investigations; it will only require them to conduct their investigation without the ability to compel state legislative assistance. Third, whereas the denial of the privilege in *Gillock* had only a "minimal impact on the exercise of his legislative function," 445 U.S. at 373, the denial of the privilege in this case will

have a substantial institutional impact on the state legislature. Amici believe that these differences clearly warrant the Court's plenary review of the question of whether comity must yield under the facts in this case.

CONCLUSION

For the foregoing reasons, the amici state legislatures respectfully urge that a writ of certiorari be granted in this case.

Respectfully submitted,

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No. 87-570 (6)

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OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BI-PARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

— Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE KANSAS LEGISLATIVE COORDINATING COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED FOR REVIEW

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

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No. 87-570

IN THE
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OCTOBER TERM, 1987

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THE UNITED STATES OF AMERICA,

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ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

BRIEF OF THE KANSAS LEGISLATIVE COORDINATING COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE AMICUS

Amicus, Kansas Legislative Coordinating Council (Council), is a statutory body consisting of the president of the senate, the speaker of the house of representatives, the speaker pro tem of the house of representatives, the majority leader of the senate, the majority leader of the house of representatives, the minority leader of the senate, and the minority leader of the house of representatives. The legislative coordinating council has general authority over all legislative services and represents the legislature when the legislature is not in session.

The 1987 Regular Session of the Kansas House of Representatives and the Kansas Senate adjourned sine die on May 21, 1987. A special session of the legislature of the state of Kansas

convened August 31, 1987 and adjourned sine die on September 5, 1987.

At a duly called meeting of the Council held September 17, 1987 the Council, by motion passed by the required statutory majority vote, determined that the Council on behalf of the Kansas Senate and the Kansas House of Representatives would file an amicus curiae brief in support of the Pennsylvania House of Representatives' petition for writ of certiorari in this case. The Kansas Senate and the Kansas House of Representatives are legislative entities duly elected and empowered to legislate for the public good in the state of Kansas as determined by the Constitution of Kansas, Article 2, §1: "The legislative power of this state shall be vested in a house of representatives and senate."

ARGUMENT

Crucial to any legislative entity is enlightened debate on a wide range of issues. To function intelligently and legislate effectively legislative entities must have adequate information. In order to assure acquisition of such information, the legislative body must have the power to investigate, either by the entire entity or its various committees.

The legislative power to investigate is a necessary and implied component of the general power to legislate, although the Constitution omits any mention of such a power. Legislative investigation requires the existence of an independent legislature free from influence, harassment, and threats of disruption from the executive

and judicial branches of both state and federal governments.

The Kansas Legislature and amicus have in the past and expect to continue to undertake fact-finding investigations to support effective legislation.

Such investigations have been hampered by subpoenas served or threatened by state and federal entities. These subpoenas have interfered with the efficiency of investigations in the legislative process and distracted legislators and especially members of the investigating committees and their staff. Also, they require expenditures of money and human resources in complying with or moving to quash such subpoenas or in forestalling the issuance and service of such subpoenas.

Experience has shown that such subpoenas are frequently used not for

their purported purpose of gaining access to documents, but rather as an attempt to examine the communications, thought processes and reasoning of legislators during such investigations to determine legislative intent.

Also, it has been the experience that when the threatened issuance of a subpoena has been forestalled with a view towards permitting the orderly completion of the legislative investigation and the subsequent review of the transcripts, exhibits, reports and conclusions of the investigative committee, the public is better served and the entity seeking the subpoena obtains as much or more useful information than might otherwise have been developed.

The continued viability of the Third Circuit decision will result in the ability of any United States

Attorney to subpoena a state legislature's records and force any or all members of a legislature and legislative staff to appear before a grand jury. Acquisition of legislative records, for even a brief period, would be very disruptive of the legislative process. Additionally, the decision below allows the United States Attorney to send a daily or weekly subpoena to obtain updates on the legislature's deliberations, hearings and even executive or closed sessions. It injects the United States Attorney into the legislative investigation process as though such Attorney was a member of the legislative body. As a result of the decision below, legislators could be subjected to intense scrutiny by any United States Attorney for their reasoning or thought processes, communications and deliberations.

The potential for disruption of ongoing legislative fact-finding and an orderly legislative process is real and dangerous. The decision sets the stage for either conscious or unconscious unwarranted judicial intermeddling in the legislative function at the behest of an overly zealous prosecutor.

The continued viability of the decision of the Third Circuit will adversely affect the interests of this amicus in unfettered fact-finding necessary to legislate for the public good. The decision of the Third Circuit also has the potential to impact further on the legislative function to the detriment of the legislative process of a state legislature.

This amicus submits that the decision below is erroneous. Because this Court's decision upon review of the decision of the Third Circuit will have

a direct impact on matters of prime importance to amicus, amicus submits this brief to assist this Court in resolution of this important matter.[1].

Amicus hereby adopts and fully incorporates by reference, the same as if set out herein in full, the arguments of the Petitioners' Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit filed with this Court which are set forth on pages six (6) through seventeen (17), inclusive, under the caption "REASONS FOR GRANTING THE WRIT."

The Third Circuit decision not only conflicts in principle with this Court's prior pronouncements and decisions of other Circuits, as set out in Petitioners' argument, but also does violence to the principles of the

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1. Per Court Rule 36, the parties have consented to filing this brief, evidenced by their letters filed with the Clerk.

doctrine of legislative immunity. The decision in effect sets up a conflict which, if not resolved by this Court, may well cause considerable interference with the state legislative process.

CONCLUSION

For the foregoing reasons, this amicus on behalf of the Kansas Legislature respectfully submits that this Court should grant Petitioners' petition for a writ of certiorari.

Respectfully submitted,

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November 2, 1987

CERTIFICATE OF SERVICE

The undersigned, ROBERT A. COLDSNOW, a member of the Bar of this Court and counsel of record for Amicus Curiae Kansas Legislative Coordinating Council, hereby certifies that on the 2nd day of November, 1987, he caused to be served the foregoing Brief of The Kansas Legislative Coordinating Council as Amicus Curiae In Support of Petitioners by placing in first class U.S. Mail, postage prepaid, three copies thereof to each counsel of record for the petitioners and respondent and the Solicitor General as follows:

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No. 87-570

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OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BI-PARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES,

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Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE ALASKA LEGISLATIVE COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a common law immunity based on speech or debate considerations protects an investigating committee of the Pennsylvania House of Representatives from forced disclosure of documents to a grand jury by subpoena duces tecum, where no member of the state legislature is the target of any federal investigation?

INTEREST OF THE AMICUS

Amicus is a permanent interim legislative committee, the Alaska Legislative Council, primarily charged by law with the administration of the legislative branch of government for the State of Alaska. The Alaska Legislative Council, amicus, is composed of duly

elected members of the House of Representatives and of the Senate empowered to legislate for the public good in the State of Alaska.

Crucial to the formation of legislation that serves the public good is enlightened debate on a wide range of issues. This requires effective investigation by the legislature and its various committees. In order for legislative investigation to be effective it is necessary that the legislature remain free from influence, harassment and threat of disruption from the executive and judicial branches of both state and federal governments. Amicus may need to undertake fact-finding investigations to support effective legislation.

Investigations of other state legislatures and legislative committees have been hampered by subpoenas served by state and federal entities. These subpoenas have interfered with the efficiency of investigations and distracted members of the investigating committees and their staff, requiring expenditures of time and money in complying with or moving to quash the subpoenas.

The continued viability of the Third Circuit decision will enable any United States Attorney to subpoena a state legislature's records and force any or all members of a legislature to appear before a grand jury at any time. Additionally, the decision below allows the United States Attorney to send a subpoena periodically to obtain updates

on the legislature's deliberations, investigations, and hearings, including executive sessions. The potential for disruption of ongoing legislative fact-finding is very dangerous.

The continued viability of the decision of the Third Circuit will adversely affect the interests of the amicus in pursuing fact-finding necessary to legislate for the public good. Amicus submits that the decision below is erroneous. Because this Court's decision will have a direct impact on matters of prime importance to amicus, amicus submits this brief to assist this Court in resolution of this important matter.

Pursuant to Rule 36 of Rules of the Court, the parties have consented to the filing of this brief. Their letters

of consent have been filed with the Clerk of the Court.

ARGUMENT

The Third Circuit decision involves an important question of federal law directly implicating the public interest which needs to be settled by this Court. The consequences of continued viability of the Third Circuit decision adversely affect not only the Pennsylvania House, but other state legislatures as well, including the legislature of the State of Alaska of which amicus is a committee.

The Third Circuit decision conflicts in principle with this Court's pronouncements in Tenney v. Brandhove, 341 U.S. 367 (1951), United States v.

Johnson, 383 U.S. 169 (1966), and, possibly, Eastland v. U.S.S.F., 421 U.S. 491 (1974). The Third Circuit decision conflicts in principle with the decision of the Second Circuit Court of Appeals in Star Distributors, Ltd. v. Marino, 613 F.2d 4 (2d Cir. 1980).

The Third Circuit decision is premised upon United States v. Gillock, 445 U.S. 360 (1980), the implications of which are in need of clarification. The merits of this important question were decided erroneously by the Third Circuit.

CONCLUSION

The amicus respectfully requests the Court to grant the petition

for a writ of certiorari.

Respectfully submitted,

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BRIEF OF THE MICHIGAN LEGISLATIVE COUNCIL AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

IDENTITY OF THE AMICUS

The Amicus is the Michigan Legislative Council, a bipartisan committee of the Michigan Legislature comprised of members of the Michigan Senate and the Michigan House of Representatives. The members of the Amicus are duly elected and empowered by the people of the State of Michigan pursuant to the Michigan State Constitution of 1963 to legislate for the public good.

INTEREST OF THE AMICUS

In the performance of their important constitutional task, it is of the utmost necessity that the Michigan Legislature and its constituent committees, such as the Amicus, receive enlightened debate on all issues of concern to the people of the State of Michigan. In order to ensure that the debate on such issues is of maximum aid to the members of the Amicus and the other Michigan legislators, the Michigan Legislature, its constituent committees, and its members must be free to perform their legislative functions independently and without fear of outside interference. To clearly demonstrate the will of the people of the State of Michigan that their legislators should have that freedom from interference, they adopted a specific provision in the Michigan State Constitution of 1963 on this issue, which provides that members of the Michigan Legislature "shall not be questioned in any other place for any speech in either house.". (Mich. Const. 1963, art. IV, §11)

To ensure truly informed decisions and comprehensive deliberations on issues of State concern, the Michigan Legislature and its constituent legislative committees often formally and informally conduct investigations of matters

involving the operation of State government or the expenditure of State funds, similar to the investigations of the Pennsylvania petitioners. For those investigations to be effective, the Michigan Legislature and its constituent committees require an independence of action that frees them from the influence, harassment, and threat of disruption from the executive and judicial branches of both State and Federal governments and would be reluctant to comply with subpoenas of legislators and legislative staff seeking to uncover legislative records. Such reluctance to disclose confidential information is especially appropriate when, as in nearly all cases of legislative investigation, no legislator is under investigation, unlike the situation in United States v. Gillock, 445 U.S. 360 (1980).

Because the investigative power of the Michigan Legislature and its constituent committees, such as the Amicus, is often critical to the performance of their legislative functions, it is of paramount importance that the Michigan Legislature and their constituent committees be given an assurance that their future investigations will not be subject to the interference of Federal officials.

In the instances in which the Michigan Legislature or a constituent committee would challenge subpoenas of legislators, legislative staff, and legislative records, even the efforts to move to quash the subpoenas would distract legislators from the performance of their constitutional functions and require expenditures of money and human resources.

If the decision of the Third Circuit remains viable, any United States Attorney would have the ability to subpoena the records of the Amicus or any other constituent committee of the Michigan Legislature and force any or all of their members to appear before a Federal Grand Jury on any relevant issue. In fact, the Third Circuit decision appears to allow the United States Attorney to send subpoenas seeking updates on the legislative investigations on a monthly, weekly, or even daily basis. Any subpoena would certainly interfere with legislative investigative activity, but the possibility of required compliance with frequent subpoenas of legislative records has the potential for even more dangerously disrupting ongoing legislative fact-finding.

The Amicus feels the Third Circuit decision was erroneously decided. Given the grave import of that decision on present and anticipated future activities of the Amicus, its members, and the Michigan Legislature as a whole, the Amicus submits this brief to urge this Court to resolve this issue in a manner that will ensure the independence necessary to the Amicus to perform its constitutional duties.[1]

[1] Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court.

ARGUMENT

The issue of legislative independence from the interference of the executive and judicial branches of State and Federal government is of critical importance to the Amicus, as it is to all State Legislatures and State legislative committees given responsibilities similar to that of the Amicus.

It is that commonality of interest that convinces the Amicus that the arguments against the continued viability of the decision of the Third Circuit as set forth by the Pennsylvania petitioners may also serve as the arguments of the Amicus. Those arguments are hereby incorporated, by reference from the document entitled "Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit" submitted to this Court on October 2, 1987, by the Petitioners, Nicholas Colafella, K. Leroy Irvis, James J. Manderino, Matthew J. Ryan, and the Bi-partisan Committee for the Administration of the House of Representatives, as the arguments of the Amicus.

CONCLUSION

For the foregoing reasons and those incorporated from the Pennsylvania petitioners' petition, the Amicus respectfully requests the writ of certiorari be granted.

Respectfully submitted,

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UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE UTAH LEGISLATURE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether a common law immunity based on speech or debate considerations protects an investigating committee of the Pennsylvania House of Representatives from forced disclosure of documents to a grand jury by *subpoena duces tecum*, where no member of the state legislature is the target of any federal investigation?

STATEMENT OF THE CASE

This *amicus* incorporates by reference the statement of the case set forth in petitioners' petition for a writ of certiorari.

INTEREST OF THE AMICUS[1]

The Utah Legislature, the party filing this *amicus* brief, is an entity comprised of 104 legislative members. Those members have been duly elected and, collectively, are vested with the legislative power of the state by the Utah Constitution.[2]

In order to effectively exercise that legislative power, the Utah Legislature must analyze, consider, and decide vital issues facing the state of Utah. The Legislature believes that the process of reasoned analysis,

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[1]Pursuant to Rule 36 of the Rules of the Court, the parties have consented to the filing of this brief. Their letters of consent are on file with the Clerk of the Court.

[2]UTAH CONST. art. VI, sec. 1.

sober deliberation, and pragmatic decision depends primarily upon its ability to obtain timely and accurate information. Therefore, it has exercised its constitutional prerogatives and created legislative interim committees and legislative staff offices to assist it in obtaining information about key issues.[3]

The purpose of legislative interim committees is "to investigate and study matters of legislative concern in the interval between general legislative sessions."[4] The interim committees' major duties are "to investigate and study possibilities for improvement in government services

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[3]UTAH CONST. art. VI, secs. 31, 32, and 33.

[4]UTAH CODE ANN. sec. 36-12-3 (1985).

within its subject area" and "to prepare and recommend to the Legislature a legislative program in response to the committee's study agenda."[5]

Legislative staff offices exercise a variety of functions. The Legislative Auditor conducts audits of funds, functions, and accounts of state and local government entities and submits a written report of each audit to each member of the Legislature.[6] The Legislative Fiscal Analyst, among other responsibilities, analyzes the executive budget and makes recommendations to the Legislature on each item or program appearing in it, analyzes and proposes changes

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[5]UTAH CODE ANN. sec. 36-12-5 (1985).

[6]UTAH CONST. art. VI, sec. 33; UTAH CODE ANN. sec. 36-12-15(4) (1985).

for more effective operational economies or administration, and conducts organizational and management improvement studies.[7] The Office of Legislative Research and General Counsel, among other responsibilities, provides research and legal analysis services to legislative interim committees, to standing committees, and to individual legislators, and serves as legal counsel to the Legislature, its committees, and its individual members.[8]

To assist the Legislature, the Senate, the House of Representatives, or any committee of either may "administer oaths, issue subpoenas,

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[7]UTAH CODE ANN. sec. 36-12-13 (1985).

[8]UTAH CODE ANN. sec. 36-12-12 (1985).

compel the attendance of witnesses and the production of papers, books, accounts, documents, and testimony" and may file a contempt proceeding in the district court to compel obedience.[10]

The director of each legislative staff office is also empowered by statute to subpoena records and agency officials to obtain information necessary to the scope of his duties.[11]

The Utah Legislature believes that its ability to perform its constitutional function would be severely crippled without adequate tools to obtain information. Utah's interim committees and staff offices frequently

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[10]UTAH CODE ANN. sec. 36-12-19 (1977); See also UTAH CODE ANN. sec. 36-12-11 (1985).

[11]UTAH CODE ANN. secs. 36-12-12, 36-12-13, 36-12-15 (1985).

conduct formal and informal investigations of a variety of state agency activities, including ethics, purchasing, management, and operations. The Utah Legislature believes that its committees and staff offices must be free to conduct investigations on its behalf, unhampered by attempts to influence, obstruct, harass, or disrupt those investigations. The Utah Legislature believes that the Third Circuit's decision allows United States' Attorneys broad powers to disrupt a state legislature's investigations. Allowing the U. S. Attorney to subpoena legislative records, staff, and committee members while an investigation is in progress appears to allow the federal government, by its very intervention, to hinder vital

state government processes.

The Utah Legislature believes that the Third Circuit's decision should be reversed. If it is allowed to stand as precedent, legitimate state legislative investigations of state processes could be impeded through fear of federal subpoenas, undermining the traditional freedom of speech and debate for legislative processes. However, regardless of whether or not this Court reverses the Third Circuit's decision, the Utah Legislature believes that this Court should consider and decide the case, so that state legislatures may conduct investigations with a clear understanding of their rights and responsibilities.

The Utah Legislature submits this amicus brief supporting the Pennsylvania Legislature's petition for certiorari, and urges this Court to issue the writ and decide the case.

SUMMARY OF ARGUMENT

A. THIS CASE PRESENTS AN IMPORTANT QUESTION OF FEDERAL LAW WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT.

The Third Circuit's decision raises an important question about the scope of state legislators' common law immunity. By refusing to apply the doctrine of legislative immunity to shield a Pennsylvania legislative investigation from a federal grand jury subpoena, the Court of Appeals has raised significant questions about

the independence of state legislatures, and about the power of all state legislatures to perform their traditional constitutional functions.

The Third Circuit's decision and rationale conflict with the philosophy and reasoning expressed by this Court in *Tenney v. Brandhove*, 341 U.S. 367 (1951); *Supreme Court of Virginia v. Consumers Union of the United States, Inc.*, 446 U.S. 719 (1980); *Gravel v. United States*, 408 U.S. 606 (1972); *Eastland v. United States Servicemen's Fund*, 421 U.S. 491 (1975); and *Lake Country Estates, Inc. v. Tahoe Regional Planning Agency*, 440 U.S. 391 (1979). In light of these cases and the Third Circuit's decision, without further

clarification from this Court about the scope and application of legislative immunity, state legislatures will be deterred from initiating new investigations, and current investigations will be delayed and unreasonably disrupted.

B. THE DECISION OF THE COURT OF APPEALS CONFLICTS WITH DECISIONS OF THE UNITED STATES COURTS OF APPEALS FOR THE FIRST AND SECOND CIRCUITS.

The Third Circuit's decision conflicts both in principle and in effect with a decision by the Second Circuit in *Star Distributors, Ltd. v. Marino*, 613 F.2d 4 (2d Cir. 1980), and by the First Circuit in *In re Hampers*, 651 F. 2d 19 (1st Cir. 1981). These decisions support application of the common law

privilege as a means to protect the integrity of the state legislative process.

C. THE DECISION OF THE COURT OF APPEALS MISCONCEIVES *United States v. Gillock*, 445 U.S. 360 (1980), THE IMPLICATIONS OF WHICH ARE IN NEED OF CLARIFICATION BY THIS COURT.

The Third Circuit erroneously relied on this Court's decision in *United States v. Gillock*, 445 U.S. 360 (1980), as grounds to reject the Pennsylvania Legislature's argument that the legislative immunity privilege protects its legislative committee investigation from a federal grand jury subpoena. This Court's holding in *Gillock* -- that the common law speech and debate privilege did not bar federal prosecutors from

introducing evidence of a state representative's support for particular legislation in a criminal prosecution against the representative for bribery -- prevented the speech and debate privilege from completely immunizing the defendant legislator from criminal liability. In this case, however, the U.S. Attorney is neither prosecuting a legislator or legislative staff member for any violation of federal law, nor is he conducting a criminal investigation of the activities of the legislative committee, its members, or its staff. Consequently, under these facts, application of the legislative immunity privilege to protect the integrity of the legislature's investigatory process has a less

significant effect on the federal government's interests than did the situation in *Gillock*, where application of the privilege would have resulted in the exclusion of evidence in a criminal prosecution. Instead, the Third Circuit's holding has a much more intrusive effect than the holding in *Gillock*. By requiring compliance with this type of investigative subpoena, the Third Circuit allows the federal government to interfere with and impede the state legislative process itself.

At the very least, the Third Circuit's application of this Court's decision in *Gillock* raises substantial questions about legislative immunity. Without some clarification of the scope and application of the

legislative immunity doctrine, state legislatures will be unable to assess or predict which of their activities are protected by legislative immunity. This uncertainty could cause legislators to be reluctant to pursue important investigations, or to comment on important public issues, because of fear of federal grand jury intervention and interference.

ARGUMENT

This *amicus* incorporates by reference the arguments set forth in petitioners' petition for a writ of certiorari.

CONCLUSION

For the reasons stated in this brief and in the Petition for a Writ of Certiorari filed on behalf of the Pennsylvania House of Representatives, *amicus* respectfully request that Pennsylvania's petition for a writ of certiorari be granted.

Respectfully submitted,

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November 4, 1987

NOV 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-570

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

NICHOLAS COLAFELLA, K. LEROY IRVIS, JAMES J. MANDERINO, MATTHEW J. RYAN, AND THE BI-PARTISAN COMMITTEE FOR THE ADMINISTRATION OF THE HOUSE OF REPRESENTATIVES

Petitioners,

v.

THE UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE FLORIDA HOUSE OF REPRESENTATIVES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports served during an ongoing legislative investigation?

INTEREST OF THE AMICUS

Amicus, the Florida House of Representatives, is a duly elected legislative body charged by the Constitution of the State of Florida[1] with the responsibility to make laws for the public good and empowered to conduct investigations necessary to further effective legislation.[2] Rational and competent decision-making by any legislative body is dependent on a broad and complete base of information. In this regard Amicus utilizes the vital fact-finding capacity of its legislative committees to provide individual

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[1] Article III, Sections 1 and 5, Florida Constitution

[2] Pursuant to Rule 36 of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court

legislators with the necessary information upon which initially to structure discussion and debate and, ultimately, to reach intelligent and informed judgments.

Information derived from committee inquiries of the Florida House of Representatives is important to legislators not only in evaluating and voting on public policy alternatives, but also in overseeing the implementation of existing state programs. Impairment of this legislative capability would narrowly restrict the scope of information available to legislators and thus would threaten the integrity of the legislative process.

The decision by the Third Circuit Court of Appeals sanctions interference of a Federal grand jury in a state

legislative investigative proceeding. By refusing in this instance to recognize a common law immunity available to state legislators under the Federal Constitution, the Court of Appeals' decision disregards the comity principles underlying our Federal system of government and calls into question the future independence of the Florida House of Representatives. The issues presented by this case, therefore, are of fundamental importance to the Florida House of Representatives.

The unfettered power of a grand jury to compel the production of legislative investigatory files is contrary to the separation of powers doctrine upon which the federal and Florida forms of government are founded. The chilling effect on witnesses and legislators of a federal prosecutor's

absolute power to intrude on state legislative business will be such that the efficacy of legislative fact-finding will be severely curtailed. In Florida, the result will be a decline in the quality and effectiveness of the state's laws.

The Speech or Debate Clause in the Federal Constitution ensures a free and independent national legislature, unburdened by restraints imposed by fears of harassment, influence or control. True federalism calls for comparable respect for the freedom and independence of state legislative bodies. The principles of legislative independence underlying the Federal Speech or Debate Clause are equally applicable to state legislatures. Independence to seek out and perpetuate free-flowing information is critical to

the ability of the Florida House of Representatives to function as an effective legislative body. The decision below imposing a restraint on essential legislative fact-finding powers is erroneous.

ARGUMENT

Amicus fully adopts the legal reasoning stated by the Pennsylvania House of Representatives in its Petition in this case.

CONCLUSION

Petitioners seek review of a decision by the Third Circuit Court of Appeals which involves questions concerning the nature and extent of common law immunity available to state legislators under the Speech or Debate Clause of the Federal Constitution. For the reasons stated above Amicus believes the continued viability of this decision

threatens the integrity and independence of Florida's legislative fact-finding process. Amicus, therefore, respectfully requests that this important question of federal law be settled by this Court and the Petition from the Pennsylvania House of Representatives for Writ of Certiorari be granted.

Respectfully Submitted,

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Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF OF THE FLORIDA SENATE AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether members of an investigative committee of a state legislature, who are not themselves targets of a federal criminal investigation, may resist a federal grand jury subpoena for their investigative documents and reports, served during an ongoing legislative investigation?

INTEREST OF THE AMICUS

Amicus, the Florida Senate, is a duly elected legislative body charged by the Constitution of the State of Florida[1] with the responsibility to enact laws and empowered to conduct investigations, and compel attendance of witnesses and production of documents and other evidence upon any matter under investigation before it or any of its committees.[2] Rational and competent decision-making by any legislative body is dependent on a broad and complete base of information. In this regard, Amicus utilizes and will continue to utilize the vital fact-finding capacity of its legislative committees to provide individual

---

[1]Article III, Sections 1 and 5, Florida Constitution

[2]Pursuant to Rule 36 of the Court, the parties have consented to the filing of this brief. Their letters of consent have been filed with the Clerk of the Court

legislators with the necessary information upon which to structure initial discussion and debate and, ultimately, to reach intelligent and informed conclusions.

Information derived from committee inquiries of the Florida Senate is important to legislators, not only in evaluating and voting on public policy alternatives, but also in overseeing the implementation of existing state programs. Impairment of this legislative capability would restrict the scope of information available to legislators and thus would threaten the integrity of the legislative process.

The decision by the Third Circuit Court of Appeals sanctions interference of a Federal grand jury in a state

legislative investigative proceeding. By refusing in this instance to recognize a common law immunity available to state legislators under the Federal Constitution, the Court of Appeals' decision disregards the comity principles underlying our federal system of government and calls into question the future independence of the Florida Senate.

The unfettered power of a grand jury to compel the production of legislative investigatory files is contrary to the separation of powers doctrine upon which the federal and Florida forms of government are founded. The chilling effect on witnesses and legislators of a federal prosecutor's

absolute power to intrude on state legislative business will be such that the efficacy of legislative fact-finding will be severely curtailed.

The Speech or Debate Clause in the Federal Constitution ensures a free and independent national legislature, unburdened by restraints imposed by fears of harassment, influence, or control. True federalism calls for comparable respect for the freedom and independence of state legislative bodies. The principles of legislative independence underlying the Federal Speech or Debate Clause are equally applicable to state legislatures. Independence to seek out any information is critical to

the ability of the Florida Senate to function as an effective legislative body. The decision below, imposing a restraint on essential legislative fact-finding powers, is erroneous.

ARGUMENT

Amicus fully adopts the legal reasoning stated by the Pennsylvania House of Representatives in its Petition in this case.

CONCLUSION

Petitioners seek review of a decision of the Third Circuit Court of Appeals which involves questions concerning the nature and extent of common law immunity available to state legislators under the Speech or Debate Clause of the Federal Constitution. For the reasons stated above, Amicus believes the continued viability of this decision

threatens the integrity and independence of Florida's legislative fact-finding process. Amicus, therefore, respectfully requests that this important question of federal law be settled by this Court and the Petition from the Pennsylvania House of Representatives for Writ of Certiorari be granted.

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In The

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October Term, 1987

Nicholas Colafella, K. Leroy Irvis,
James J. Manderino, Matthew J. Ryan,
and the Bipartisan Committee for the
Administration of the House of Representatives,
Petitioners,

v.

United States of America,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

---

BRIEF OF THE ASSEMBLY OF THE STATE OF NEW YORK AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

---

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I. QUESTION PRESENTED AND STATEMENT OF THE CASE

The Question Presented and Statement of the Case are fully set forth in Petitioners' Petition for a Writ of Certiorari herein and *Amicus Curiae* adopts and incorporates the same.

II. INTEREST OF *AMICUS CURIAE*

1. *Amicus Curiae* the Assembly of the State of New York (herein "the Assembly") is a legislative entity empowered by the Constitution and laws of the State of New York to legislate on behalf of the people of the State.

2. Crucial to the Assembly's ability to perform its legislative duties is the power to conduct investigations in order to gather information and viewpoints on matters requiring legislative attention.

3. New York Legislative Law Article 4 empowers legislative standing committees, duly-constituted subcommittees thereof, and joint legislative committees of both Houses to conduct investigative hearings both public and private, to compel the attendance of witnesses and the production of documents, to administer oaths and to confer immunity.

4. Pursuant to such authorization, the Assembly regularly conducts such investigations, and it is expected that such investigations shall continue to be conducted in the future.

5. Confidentiality of testimony and anonymity of witnesses at legislative hearings has often proved to be an indispensable element of legislative committees' ability to obtain information necessary to the success of such investigations. In recognition of this important element of the investigative function, section 73(8) of the New York Civil Rights Law provides that "no testimony or other evidence adduced at a private hearing [as defined herein] . . .shall be disseminated or made available to the public

by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. A person who violates the provisions of this subdivision shall be guilty of a misdemeanor."

6. Assembly experience demonstrates that, without an absolute assurance of confidentiality and/or anonymity, a great deal of information central to the success of its investigations would not have been made available. Examples include the following:

a) A joint legislative investigation of the problem of child abuse relied upon testimony of individuals who testified only when absolute assurance was given that their testimony and identities would be kept confidential.

b) Numerous investigations of state and municipal agencies have relied upon the confidential testimony of the employees thereof.

c) Investigations of state correctional institutions have relied upon legislative access to inmate records on a confidential basis.

7. The continued viability of the decision of the Third Circuit Court of Appeals herein will severely hamper the Assembly's ability to conduct investigations crucial to its effective performance of the legislative function, in that the Assembly will be unable to give absolute assurance of confidentiality in order to obtain information necessary to the success of such investigations.

8. The protection of state legislative committees from forced disclosure of documents and information is necessary to preserve the investigative function essential to the lawmaking process.

III. ARGUMENT

A. This case presents an important question of federal law which has not been, but should be, settled by this Court.

The issue raised by this case is of fundamental importance to *Amicus* in that it threatens the ability of the Assembly to perform its legislative function through the investigations conducted by its committees free from the threat of interference by federal authorities. *Amicus* relies in the performance of such function upon the doctrine of legislative immunity, which the Court of Appeals for the Third Circuit failed to recognize under the instant facts. The parameters, scope and extent of the privilege of information gathered by state legislative investigations has not been, but should be, determined by this Court. *Amicus* submits that the principles underlying the Speech and Debate Clause of the United States Constitution and the comparable provision of the New York State Constitution, Art. III, Sec. 11, should be interpreted to immunize state legislative committee materials from subpoena by federal authorities, and in support thereof adopts and incorporates the argument of Petitioners' Petition for a Writ of Certiorari herein.

B. The decision of the Court of Appeals conflicts with decisions of the United States Courts of Appeals for the First Circuit in *In re Hampers* and the Second Circuit in *Star Distributors, Ltd. v. Marino* and misconceives *United States v. Gillock*, the implications of which are in need of clarification by this Court.

Amicus adopts and incorporates the arguments on these points in Petitioners' Petition for a Writ of Certiorari herein.

IV. CONCLUSION

For the foregoing reasons, *Amicus* respectfully submits that Petitioners' Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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December 4, 1987

APPENDIX

NEW YORK LEGISLATIVE LAW

Sec. 60. Testimony before legislative committees. A legislative committee may require the attendance of witnesses in this state whom the committee may wish to examine, or may issue a commission for the examination of witnesses who are out of the state or unable to attend the committee or excused from attendance, which commission if directed by the house or legislature by which the committee is appointed may be executed during the recess of the legislature. A commission issued as provided by this section shall be in the form used in the courts of record of this state and shall be executed in like manner. Unless otherwise instructed by the committee appointing them the commissioners shall examine privately every witness attending before them and shall not make public the particulars of such examination. No committee of either house or a joint committee of both houses shall have the power to take testimony at a private hearing or at a public hearing unless at least two of its members are present at such hearing.

Sec. 61. Subcommittees. Whenever any committee of either house or a joint committee of both houses of the legislature shall be required to make an inquiry or investigation, such committee may appoint a subcommittee of not less than three of its own members to make such inquiry or investigation, and to take testimony in relation thereto; and such committee or subcommittee and the chairman thereof shall respectively have all the powers and authority, which are conferred by law upon any committee which is authorized to send for persons or papers, or upon the chairman thereof. No subcommittee shall have the power to take testimony at a private hearing or at a public hearing unless at least two of its members are present at such hearing.

Sec. 62. Witnesses' fees. Any person attending as a witness under the provisions of the last two sections shall receive the same fees as are allowed witnesses in civil actions in courts of record. Such

fees need not be prepaid, but the comptroller upon the certificate of the chairman of the committee, and proof by affidavit or otherwise that the same is due, shall draw his warrant for the payment of the amount thereof.

Sec. 62-a. Subpoenas; oaths. The chairman, vice-chairman or a majority of a legislative committee may issue a subpoena requiring a person to attend before the committee and be examined in reference to any matter within the scope of the inquiry or investigation being conducted by the committee, and, in a proper case, to bring with him, a book or paper. The provisions of the civil practice law and rules in relation to enforcing obedience to a subpoena lawfully issued by a judge, arbitrator, referee or other person in a matter not arising in an action in a court of record apply to a subpoena issued by a legislative committee as authorized by this section. Any member of a legislative committee may administer an oath to a witness.

Sec. 62-b. Joint legislative committee competent authority to confer immunity. In any inquiry or investigation by a joint legislative committee, such committee is a competent authority to confer immunity in accordance with section 50.20 of the criminal procedure law. Immunity may be conferred only upon the concurrence of a majority of the full membership of such committee and provided that at least twenty-four hours prior written notice is given to the attorney general of the state of New York and to the appropriate district attorney having an official interest therein.

NEW YORK CIVIL RIGHTS LAW

Sec. 73. Code of fair procedure for investigating agencies. 1. As used in this section the following terms shall mean and include:

(a) "Agency". A standing or select committee of either house of the legislature or a joint committee of both houses; a duly authorized subcommittee of any such legislative committee; the commissioner of investigation acting pursuant to section eleven of the executive law; a commissioner appointed by the governor

acting pursuant to section six of the executive law; the attorney general acting pursuant to subdivision eight of section sixty-three of the executive law; any temporary state commission or any duly authorized subcommittee thereof which has the power to require testimony or the production of evidence by subpoena or other compulsory process in an investigation being conducted by it; and any standing or select committee, or subcommittee thereof, of the constitutional convention to be held in the year nineteen hundred sixty-seven.

(b) "Hearing". Any hearing in the course of an investigatory proceeding (other than a preliminary conference or interview at which no testimony is taken under oath) conducted before an agency at which testimony or the production of other evidence may be compelled by subpoena or other compulsory process.

(c) "Public hearing". Any hearing open to the public, or any hearing, or such part thereof, as to which testimony or other evidence is made available or disseminated to the public by the agency.

(d) "Private hearing". Any hearing other than a public hearing.

2. No person may be required to appear at a hearing or to testify at a hearing unless there has been personally served upon him prior to the time when he is required to appear, a copy of this section, and a general statement of the subject of the investigation. A copy of the resolution, statute, order or other provision of law authorizing the investigation shall be furnished by the agency upon request therefor by the person summoned.

3. A witness summoned to go a hearing shall have the right to be accompanied by counsel, who shall be permitted to advise the witness of his rights, subject to reasonable limitations to prevent obstruction of or interference with the orderly conduct of the hearing. Counsel for any witness who testifies at a public hearing may submit proposed questions to be asked of the witness relevant to the matters upon which the witness has been questioned and the agency shall ask the witness such of the questions as it may deem appropriate to its inquiry.

4. A complete and accurate record shall be kept of each public hearing and a witness shall be entitled to receive a copy of his testimony at such hearing at his own expense. Where testimony which a witness has given at a private hearing becomes relevant in a criminal proceeding in which the witness is a defendant, or in any subsequent hearing in which the witness is summoned to testify, the witness shall be entitled to a copy of such testimony, at his own expense, provided the same is available, and provided further that the furnishing of such copy will not prejudice the public safety or security.

5. A witness who testifies at any hearing shall have the right at the conclusion of his examination to file a brief sworn statement relevant to his testimony for incorporation in the record of the investigatory proceeding.

6. Any person whose name is mentioned or who is specifically identified and who believes that testimony or other evidence given at a public hearing or comment made by any member of the agency or its counsel at such hearing tends to defame him or otherwise adversely affect his reputation shall have the right, either to appear personally before the agency and testify in his own behalf as to matters relevant to the testimony or other evidence complained of, or in the alternative at the option of the agency, to file a statement of facts under oath relating solely to matters relevant to the testimony or other evidence complained of, which statement shall be incorporated in the record of the investigatory proceeding.

7. Nothing herein contained shall be construed to prevent an agency from granting to witnesses appearing before it, or to persons who claim to be adversely affected by testimony or other evidence adduced before it, such further rights and privileges as it may determine.

8. Except in the course of a subsequent hearing which is open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview conducted before a single-member agency in the course of its investigation shall be

disseminated or made available to the public by said agency, its counsel or employees without the approval of the head of the agency. Except in the course of a subsequent hearing open to the public, no testimony or other evidence adduced at a private hearing or preliminary conference or interview before a committee or other multi-member investigating agency shall be disseminated or made available to the public by any member of the agency, its counsel or employees, except with the approval of a majority of the members of such agency. Any person who violates the provisions of this subdivision shall be guilty of a misdemeanor.

9. No temporary state commission having more than two members shall have the power to take testimony at a public or private hearing unless at least two of its members are present at such hearing.

10. Nothing herein contained shall be construed to effect, diminish or impair the right, under any other provision of law, rule or custom, of any member or group of members of a committee or other multi-member investigating agency to file a statement or statements of minority views to accompany and be released with or subsequent to the report of the committee or agency.

NEW YORK CONSTITUTION, ARTICLE III

Sec. 11. For any speech or debate in either house of the legislature, the members shall not be questioned in any other place.